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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, PETITIONER

vs.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 29, 1948
CERTIORARI GRANTED OCTOBER 11, 1948

SUPREME COURT OF THE UNITED STATES

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No. 132

THE UNITED STATES, PETITIONER,

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RICHARD S. CORS

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1 In the United States Court of Claims

Docket No. 46796

RICHARD S. CORS, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed January 3, 1946

To the Honorable, the Court of Claims of the United States:

The Plaintiff, Richard S. Cors of New York, N. Y., respectfully represents that:

One: He is a citizen of the United States of America, residing in the County of Kings, State of New York.

Two: This suit is brought pursuant to Section 902, (d) of the Merchant Marine Act of 1936, as amended (53 Stat. 1256, 46 USC Sec. 1242 (d) to recover the balance of just compensation due plaintiff by defendant for the requisitioning of his steamtug.

2 Three: On and prior to October 15th, 1942, plaintiff was the owner of an iron steam screw vessel known as the MacArthur, whose official number was 241525. The vessel was built in 1895 in Baltimore, Maryland of charcoal iron. She had a speed of approximately 12 knots per hour, was 83.3 feet long, 17.6 feet beam, 9.6 feet depth and had a draft of approximately 7.6 feet. Her gross tonnage was 98.38 and her net tonnage 66. She had 250 horsepower. Aside from a large pilot house forward above the main deck she had a mess room, galley, toilet and shower, fiddley, upper engine room, stateroom with one berth, large room in main house from forward aft, large wardroom with two berths below decks aft of engine room and crews accommodations for eight below decks forward.

Four: On October 15th, 1942 the vessel was completely equipped to engage in the towage of other vessels. She was drydocked and her boiler extensively repaired, tested, inspected and passed by the United States Coast Guard Service and a certificate was issued by such Service under date April 18th, 1942. Her hull showed very minor wastage due to the fact that she was built of charcoal iron, had previously operated largely in fresh water, had had only limited usage and had been well kept up.

Five: The vessel was peculiarly well adapted to engage in towage of vessels and harbor craft in and about bays, sounds, rivers and harbors, for which she was licensed, not only in and about New York Harbor and tributary waters including Long Island Sound and the Hudson and East Rivers, but also the New York State Barge Canal and Great Lakes ports.

3 Six: The fair market value of the vessel on October 15th, 1942 was at least $20,000.

Seven: The War Shipping Administrator, acting on behalf of the War Shipping Administration, pursuant to the authority conferred by,

(1) Section 902 (a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1255, USC Sec. 1242(a),

(2) The proclamation of the President of the United States made on May 27th, 1941, and

(3) Executive Order No. 9054 of February 7, 1942,

did on October 15, 1943, requisition title to plaintiff's vessel, the steam screw MacArthur, together with all furniture, fixtures, spare parts, appurtenances, and equipment thereunto appertaining and belonging. Delivery of the said vessel, together with her equipment was made to the War Shipping Administration at New York, N. Y. at 12:00 noon, October 15, 1942.

Eight: Thereupon, the defendant became obligated, under the aforesaid Section 902 (a) of the Merchant Marine Act of 1936, amended (53 Stat. 1255, 46 USC Sec. 1242(a), and the Fifth Amendment to the Constitution of the United States, to pay to plaintiff just compensation for the property so taken. Plaintiff submitted its claim and supporting data to the War Shipping Administration in an effort to have the Administrator fix the just compensation due plaintiff for said vessel, and her equipment, pursuant to the law in such case made and provided.

Nine: At the time that the said vessel was taken from plaintiff through the requisition order of the War Shipping Adminis-
4 tration, plaintiff became and was entitled to receive from the defendant, as just compensation for his property, the sum of at least $20,000, this amount being the reasonable and just market value of the property taken from the plaintiff by the defendant on the date of the taking, and being the amount of compensation necessary to be paid to plaintiff as a full and perfect equivalent in money of the property taken from him.

Ten: On May 18th, 1944, the War Shipping Administrator, acting on behalf of the War Shipping Administration, determined that plaintiff was entitled to the sum of only $9,000 as just compensation for the vessel, its furniture, fixtures, spare parts, appurtenances and equipment, taken from plaintiff by defendant under the requisition order aforesaid, and notified plaintiff that the total compensation to be offered by defendant to plaintiff for his property aforesaid was $9,000. Thereafter, on or about June 26th, 1944 plaintiff advised the defendant, represented by the Administrator, War Shipping Administration, that the amount of just compensation determined by the defendant was wholly unsatisfactory to the plaintiff.

Eleven: On or about July 17th, 1944, plaintiff and defendant, represented by the Administrator, War Shipping Administration, entered into an agreement whereby the defendant agreed to pay to plaintiff the sum of $6,750, being 75 per centum of the amount determined by the Administrator to be just compensation for the vessel, its equipment, and reserving to the plaintiff the right to sue the defendant in accordance with the provisions of Section 902 of the Merchant Marine Act of 1936, as amended, to recover such further sum as, added to the payment effected thereunder, would make up just compensation for the vessel. The said sum of $6,750 was paid to plaintiff on August 21st, 1944.

Twelve: The difference between $20,000, the amount the plaintiff was entitled to receive as just compensation for his property, and $6,750, the partial payment made by defendant to plaintiff as aforesaid, is $13,250. Plaintiff has suffered a loss in the latter amount by virtue of the requisition of his property in addition to interest, as part of just compensation, on $20,000 from October 15th, 1942 to August 21st, 1944, when the partial payment was made, and will continue to suffer loss by way of interest as part of just compensation on the balance of $13,250 due plaintiff as just compensation from August 21st, 1944 to the date of that just compensation shall be paid to plaintiff for its property.

Thirteen: No other action, suit or proceeding has been had with respect to the within claim in any Court, in the Congress or in any of the Departments other than as herein set forth. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. Plaintiff is the sole and absolute owner of the claim herein presented, and has made no transfer or assignment of said claim or any part thereof or any interest therein. Plaintiff is justly

entitled to the full amount claimed herein from the defendant after allowing all just credits and offsets.

Wherefore, plaintiff prays judgment in his favor and against defendant, the United States of America, upon the facts
6 and law for the sum of $13,250, together with interest, as part of just compensation, at the rate of 6 per cent per annum on $20,000 from October 15th, 1942 to August 21st, 1944 and on $13,250 from August 21st, 1944 until just compensation is paid to plaintiff, pursuant to the law in such case made and provided, together with costs and disbursements of this action and for such other and further relief as may to this Honorable Court seem just and proper in the premises.

Respectfully submitted,

Sgd./ CHARLES B. MCINNIS,
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Washington, D. C.
Sgd./ FRANK C. MASON,
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Counsel for Plaintiff

Of Counsel:
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7-8 *Duly sworn to by Richard S. Cors. Jurat omitted in printing.*

9-10 GENERAL TRANVERSE—Filed February 12, 1946

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(S.) JOHN F. SONNETT,
Assistant Attorney General.

J.B.M.
N.A.C.
E.E.E.

ARGUMENT AND SUBMISSION OF CASE—December 1, 1947

On December 1, 1947, the case was argued by Mr. Frank C. Mason for plaintiff, by Mr. Edgar T. Fell for defendant, and by Mr. William M. Aiken as Amicus Curiae.

11 SPECIAL FINDINGS OF FACT, CONCLUSION OF LAW, AND OPINION OF THE COURT BY WHITAKER, J.—Filed January 5, 1948.

Mr. Frank C. Mason for the plaintiff. *Messrs. Harold A. Kertz, Charles B. McInnis, Mahar & Mason* and *Roberts & McInnis* were on the brief.

Mr. Edgar T. Fell, with whom was *Mr. Assistant Attorney General Herbert A. Bergson*, for the defendant. *Mr. John B. Miller* was on the brief.

Mr. William M. Aiken as *Amicus Curie*. *Messrs. John G. Laylin, Edward G. Howard*, and *Covington, Burling, Rublee, Acheson & Shorb* were on the brief.

The facts necessary to a decision of the case are set out in the opinion; they are set out more in detail in the following

SPECIAL FINDINGS OF FACT

1. The plaintiff, a citizen of the United States, was on October 15, 1942, the sole owner of a steam vessel which he had theretofore named the *MacArthur*. On that date the War Shipping Administration, pursuant to Section 902 (a) of the Merchant Marine Act of 1936 as amended (53 Stat. 1254, 1255, requisitioned and took from plaintiff the ownership, possession and use of the vessel, including all of her equipment and spare parts.

2. The War Shipping Administration determined the amount of $9,000 to be just compensation for the vessel and on May 18, 1944, offered that sum to the plaintiff in full payment thereof. On June 26, 1944, plaintiff rejected the offer but on August 7, 1944,
12 he executed a bill of sale, a transferring title to the vessel to the United States, in consideration of the payment to him of $6,750, being 75 percent of the amount awarded by the defendant. In the bill of sale, plaintiff reserved the right to sue the United States to recover such further sum as, added to the $6,750, would constitute just compensation "in accordance with the provisions of Section 902 (a) of the Merchant Marine Act of 1936 as amended." On August 21, 1944, plaintiff received payment of $6,750.

3. The vessel, which was originally named the *Guthrie*, was built at Baltimore, Maryland, in 1895 according to the specifications and under the inspection of the U. S. Coast Guard. She is a steam-powered vessel with a charcoal iron hull.

At the time of the requisition, her gross and net tonnages were respectively 98.38 and 66. Her overall length was 90 feet and she was 83.3 feet long between perpendiculars. She had a beam of 17.6 feet, a depth of 9.6 feet and a draft of 7.6 feet. Her indicated horsepower was 200; her maximum speed was 9.5 knots; her cruising speed was 8.5 knots and her cruising radius 1,264 knots. Her bunker capacity was 27 tons of coal and her fuel consumption was from 5 to 6 tons per twenty-four hours.

She had an open deck with a bulwark surrounding it and had a main deckhouse above. At the forward end, there was a pilot house. In the main deckhouse there was a mess room, galley, toilet and shower, fiddley, upper engine room, stateroom with one berth and a large inspector's room. Below decks there was a large ward room with two berths and crew accommodations for eight.

She was fitted with a steam steering gear, domestic water tanks and reserved feed tanks for engine consumption, ballast and bunkers for coal.

She was equipped with a lifeboat, anchor, searchlight and life raft.

She was powered with a fore-and-aft compound engine, 12 inches by 24 inches by 20-inch stroke and was equipped with one Scotch boiler having two corrugated furnaces and a steam chimney. She had a steam-engine-driven generator, a condenser, pumps and a bronze propeller. She was also fitted with lines, hose, fire extinguishers, fire exhaust, tools and some spare parts.

13 Her consumable stores included 15 tons of coal, 15 gallons of engine oil and 10 gallons of cylinder oil.

4. From the time she was built until March 19, 1942, when she was sold to the plaintiff, the *Guthrie* remained in the ownership and possession of the U. S. Coast Guard. Until November 1939, the vessel was stationed in Baltimore harbor and was used by the Coast Guard as a boarding tender or tug to transport immigration, customs and health officers from the shore to vessels arriving in the harbor. She was never used for towing other vessels except in emergencies or for rescue work. During the greater part of her operations she was in fresh or brackish water rather than in salt water. Her work was much lighter than that engaged in by commercial towing vessels and consisted of irregular and infrequent trips from her berth in the harbor to and from incoming vessels.

A charcoal iron hull has a longer life than a steel hull and is much less affected by exposure to salt water and the elements. This, together with the manner in which the vessel was maintained and used, made for a longer life than if she had been constructed of steel and had been regularly engaged in commercial towing work in salt water.

5. In the latter part of 1939, the *Guthrie* was transferred from Baltimore Harbor to the Coast Guard base at Portland, Maine. On September 13, 1941, a special Board of Survey, appointed by the Coast Guard to ascertain the condition of the vessel and make recommendations regarding her disposition or repair, surveyed her and reported as follows:

HULL.—(a) That the plating (wrought iron) has considerable corrosion on interior surfaces but, generally speaking, is in good condition considering age of vessel.

(b) That there is about twenty hull frames and reverse frames in bad condition.

(c) That the water-tight bulkhead between the engine room and wardroom is corroded badly and leaks, allowing engine room bilge water to run back into the wardroom space.

(d) That the water-tight bulkhead between wardroom space and lazaret is completely corroded away at bottom where bulkhead joins hull frame.

(e) That the deck frames are in fair condition.

(f) That the tie plates are completely corroded away in places.

14 (g) That the main deck was found to be in fair condition and tight.

(h) That the deck house and superstructure is in fair condition.

(i) That the fresh water tanks in the lazaret leak and need repairing.

BOILER.—(a) That the boiler is excessively corroded on both water and fire surfaces.

(b) That there is a 5/16" hole corroded through the bottom of the starboard furnace just aft of the combustion chamber and that the metal is less than 1/15" thick at this point.

(c) That there is a 1/4" hole corroded through the back of the combustion chamber on the starboard side and about 5 inches up from the bottom, and the metal is very thin in this vicinity.

(d) That there is at least a 1/4-inch coating of scale and corrosion on top of the furnace crown sheets.

(e) That this boiler is unsafe to operate.

MAIN ENGINE.—In fair condition.

AUXILIARIES.—In fair condition.

Opinion.

That under normal conditions and considering the age of the vessel, the expense of putting this vessel in operating condition would not be justifiable and that the vessel should be placed out of commission; however, due to the present emergency and the great need of vessels, it is believed that necessary repair should be made to the hull, superstructure and fresh-water tanks, and the present boiler be removed and replaced by a suitable coal-fired watertube boiler or that the present steam plant be removed and replaced by a suitable Diesel plant with a small boiler to furnace steam heat. By doing the above work, it is believed that three or four years satisfactory service could be had from this vessel.

Recommendation

The board recommends that the necessary repairs be made to the hull, superstructure, and fresh-water tanks, and that the present boiler be removed and replaced by a suitable coal-fired water tube boiler or that the present steam plant be removed and replaced by a suitable Diesel plant with a small boiler for steam heat. The main engine and auxiliaries be examined and necessary repairs made to put them in good operating condition, this work to be done by the ship's force. That all interior metal surfaces be chipped, wire-brushed, and painted out by
15 the ship's force during this repair period.

6. After receiving the foregoing report, opinion and recommendation, Coast Guard Headquarters directed that the *Guthrie* be sold to the highest bidder in accordance with regulations.

Accordingly, the sale was advertised on the basis of sealed bids to be submitted by prospective buyers. The sale was conducted as an open-market transaction, but only three bids were received. On March 19, 1942, the vessel was sold to plaintiff, the highest bidder, for the sum of $2,875.

7. Promptly after purchasing the *Guthrie*, plaintiff applied to the Bureau of Marine Inspection and Navigation, Department of Commerce, for a certificate of inspection. The hull and boiler were inspected and plaintiff was required to perform certain repair work on the boiler in order to obtain the certificate. On April 20, 1942, plaintiff was issued a Certificate of Inspection, in which the vessel was designated as a "towing steam vessel" and was permitted "to navigate for one year, the waters of bays, sounds, rivers and harbors."

8. During the period between March 19, 1942, and April 26, 1942, plaintiff caused certain repairs and betterments to be made to the

vessel and purchased equipment necessary for her operation. Part of the work was performed by plaintiff and a crew of four men working under his supervision, and part was performed by a shipyard at Portland, Maine. Plaintiff was experienced in performing and supervising such repairs and improvements and tried to keep the costs as low as possible. He expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had all of the work been performed by a shipyard at the abnormally high rates being charged at that time.

9. On April 21, 1942, a Consolidated Certificate of Enrollment and License was issued by the Department of Commerce, which granted plaintiff a license to employ the vessel in the coasting trade for a period of one year. After the repairs and improvements had been completed, plaintiff brought the vessel to New York City under her own power. After arriving in New York, he had her name changed from *Guthrie* to *MacArthur*. She was moored for a few days at a pier on the East River and from there was moved
16 under her own power to Chelsea, Staten Island, New York, where she remained until taken by the defendant. The *MacArthur* did not engage in any towing operations or other commercial work between the time she was acquired by plaintiff and the date of the requisition.

10. On September 25, 1942, the *MacArthur* was surveyed by Lieutenant Commander George Schneider, U. S. Navy, for the purpose of determining her suitability for use on the Eastern Sea Frontier of the U. S. Navy as a steam heating plant for heating and pumping fuel oil from oil barges into combat vessels of the Navy. The written report of the survey with respect to the condition of the vessel read as follows:

> The "*MacArthur*" formerly the U. S. R. S. "*Guthrie*," operated by the U. S. C. G. is a coal burning steam tug and tender with iron hull, four steel water-tight bulkheads, wood deckhouse, plumb bow and over hanging rounded stern. The outer hull plating is pitted at the water line and there is evidence of moderate scale, the stem is slightly bent and the bow hull plating, Stbd. & Port side above the water line is slightly dented. The inner skin, bulkheads and frames are slightly pitted and there is moderate scale. Bulkhead #2 is badly corroded at the base and the metal is sloughed away at the edges of several frames in the coal bunkers. There is a layer of cement of about $\frac{3}{4}$" to 1" in thickness in the turn of the bilge, and the after-bilge has approximately 8 Ton of Pig-Iron Ballast. The steel plating under the wood main deck is badly corroded. The wood deckhouse, main deck, bulwark and guard rail are in fair to good condition; no structural weakness was noted. The

vessel was in the water at the time of inspection, the underwater portion of the hull could not be examined. The main engine, boiler and auxiliary machinery were not opened at the time of inspection, but are reported to be in satisfactory operating condition. During March and April 1942, and prior to issuing a certificate, this vessel was inspected by the Local Inspectors Bureau of Marine and Inspection Service at Portland, Maine. At that time the boiler was drill tested and the recorded thickness is .538, a section of wrapper sheet and 27 Stay bolts, including several rivets were renewed. Considering the age of the vessel the material condition as a whole is fair to good.

17 Commander Schneider estimated that the original cost of the *MacArthur* was $45,000; that her replacement cost was $56,000 and he appraised her at $9,000.

His appraisal was based on his opinion that the tug, without excessive expenses for repairs, had six years of useful life. He decided that the value of the vessel should be depreciated during the remaining useful life at 3.3 percent per year and he calculated that she was worth 19.8 percent of her estimated cost, or about $9,000. The appraisal did not take into account the market value of the vessel.

11. After the War Shipping Administration requisitioned the *MacArthur* on October 15, 1942, she was used by the Navy at the docks of the Eastern Sea Frontier for furnishing steam to heat oil for use in combat vessels. There is no proof that she was used by the Navy for any other purpose.

12. By an Executive Order issued October 15, 1943, the President of the United States established an Advisory Board on Just Compensation, consisting of Judge Learned Hand, Judge John J. Parker, and Judge Joseph C. Hutcheson, Jr., to establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned by the Administration. On December 7, 1943, the Board submitted to the Director of the War Shipping Administration its report, which, insofar as pertinent contained the following rules:

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest.

Value means value on the American market, not on foreign markets.

* * * * * * * *

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based.
18 These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

13. In determining the amount of just compensation to be paid for the *MacArthur*, the War Shipping Administration had before it and was guided by the survey made by the Coast Guard on September 13, 1941 (finding 5), the survey and appraisal made by Commander Schneider on September 25, 1942 (finding 10), and the rules established by the Advisory Board on Just Compensation.

14. At the time of the requisition, there existed in and about the Port of New York a rising market and a strong demand for tugs of all types, including the *MacArthur*. This situation was due to the

greatly increased traffic in the harbor during the period of the war, to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs. Tugs were operated day and night in an effort to handle the increased business and, under those conditions most tug owners were reluctant to sell. However, from August 1941 to February 1943, six tugboats were sold on the open market in or near the Port of New York. None of these sales involved a vessel closely comparable to the *MacArthur* in design, power, and equipment.

15. The *MacArthur* was not designed or powered for engaging in general towing operations as in the case of most tug boats built specifically for such work. Her beam was too narrow in proportion to her length and her deckhouse was too long. Her power plant was old and the cost of providing fuel was high in relation to the amount of horsepower obtained. She was too small for docking or otherwise handling oceangoing ships in the harbor or for engaging in coastwise towing.

She could have been adapted for use in the Erie Canal, but in order to compete successfully with other tugs engaged in that work, it would have been necessary to convert her from steam to Diesel power. The proof does not show the cost of making this change in power at the time of the taking.

However, the *MacArthur* could have been used as a towing vessel for shifting barges, lighters, and other craft in the congested slips in the harbor and for towing barges or pushing oil barges about New York Harbor, in Long Island Sound, and in the New York State Barge Canal. Her beam in relation to her length did not detract from her capacity for performing such work and her comparatively shallow draft was advantageous for harbor and shoal water towing.

Although she was fitted with side bitts for towing alongside, she lacked a stem head and stern towing bitts, which are necessary to enable any tug to tow other craft astern. At the time of the requisition, it would have cost $3,500 to install the necessary towing bitts on the *MacArthur*.

16. The fair market value of the *MacArthur* at the time and place of the taking was the sum of $15,500.00.

17. Beginning on September 8, 1939, the date on which the President proclaimed the existence of a limited national emergency, and continuing up to the date that plaintiff's vessel was requisitioned, there was a general rise in the market values of nearly all vessels in and about the Port of New York. This increase in values between September 8, 1939 and May 27, 1941, the date on which the President proclaimed the existence of a general national emergency, was due to the demand for vessels which followed the outbreak of war in Europe. After May 27, 1941 and particularly after December 7,

1941, the date of the Japanese attack on Pearl Harbor, the
20 rise in market values was due to the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic which occurred during the period of the war. These conditions combined to create a demand for and a shortage of tugs. As a result, the market value of the *MacArthur* had been enhanced by the sum of $5,000.00 by October 15, 1942.

Prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect.

18. Just compensation for the taking of the *MacArthur* is $15,500 plus compensation for delay in payment computed at four percent per annum on this amount from October 15, 1942 until August 21, 1944, and on $8,750.00 from August 21, 1944 to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of $6,750.00.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover the sum of $15,500, plus compensation for delay in payment, computed at four percent per annum on this amount from October 15, 1942, until August 21, 1944, and on $8,750.00 from August 21, 1944, to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of $6,750.00.

It is therefore ordered and adjudged that plaintiff recover of and from the United States the sum of fifteen thousand five hundred dollars ($15,500), plus compensation for delay in payment, computed at four (4) percent per annum on this amount from October 15, 1942, until August 21, 1944, and on eight thousand seven hundred fifty dollars ($8,750) from August 21, 1944 to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of six thousand seven hundred fifty dollars ($6,750.00).

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Opinion

Whitaker, *Judge*, delivered the opinion of the court:

On October 15, 1942, defendant requisitioned plaintiff's steamship *MacArthur*. The War Shipping Administration determined that $9,000 was just compensation. Upon plaintiff's rejection of this award there was paid to him the sum of $6,750, being 75 percent of the amount of the award as required by the Merchant Marine Act of 1936 (53 Stat. 1254, 1255). He sues for what he says is just compensation.

The vessel was built in 1895 for the Coast Guard, and was operated by it until about March 19, 1942, when it was sold to the highest bidder for $2,875.00. Plaintiff, the purchaser, spent $5,699.78 on repairing it, doing much of the work himself at a considerable saving in cost.

After the vessel had been reconditioned, and a license for its operation had been secured on April 21, 1942, it was removed to New York City, where it was moored until it was requisitioned by the defendant on October 15, 1942.

The commissioner has found that $15,500 was its fair market value at the time of the taking. Plaintiff does not acquiesce in this, but we do not think a higher value can be justified. This, we think, represents its fair market value. It is almost twice as much as plaintiff's investment in the vessel.

Defendant admits that the boat could have been sold on the market for this amount, but it admits liability for only $10,500, because it says that $5,000 of the market value of the vessel was due to an enhancement in market value brought about by the Government's need for vessels which necessitated their taking. The defendant claims that the amount of such enhancement in value should be deducted from the fair market value of the vessel in determining just compensation. This is the principal issue in the case. In determining it, we have been much assisted not only by the briefs of the parties but also by a brief filed by Covington, Burling, Rublee, Acheson & Shorb as *amicus curiae*.

We have found that the increase in the market value of this vessel was due, first, to the great increase in shipping and harbor traffic due to the war and, second, to the Government's need for vessels in the prosecution of the war, which necessitated the requisi-
22 tioning of many of them.

It is not possible to allocate to the second cause a definite part of the increase in market value, but even if it were possible to do so, we do not think the defendant is entitled to a deduction from market value on this account. We do not think the Government should pay a property owner less than he could have secured for his property from someone else. If an owner has a vessel and there are people who are willing to pay him $15,500 for it, and he wants to sell it at this price, but the Government intervenes and takes his vessel, it is not just, ordinarily at least, that the Government should pay him for it any lesser amount. Except in rare circumstances, he has not been justly compensated for his property unless he secures from the condemner what he could have secured from others.

Fair market price, where there is a free market, has ever been the usual standard of just compensation. *Boom Co.* v. *Patterson*, 98 U. S. 403, 407; *Monongahela Navigation Co.* v. *United States*,

148 U. S. 312, 327; *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 80, 81; *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299; *Vogelstein* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries*, 262 U. S. 341; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Miller*, 317 U. S. 369, 374.

Defendant says, however, that this rule does not apply where the Government is forced by the necessities of war to condemn property. In support of this statement it relies particularly on *United States* v. *Miller*, *supra*, and on Rule 4 laid down by the President's Advisory Board on Just Compensation, consisting of Judges Learned Hand, John J. Parker and Joseph C. Hutcheson, and also on section 902 (a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1254, 1255).

We do not think the case of *United States* v. *Miller*, *supra*, supports defendant's position. That case reiterates the holding of the Supreme Court in *Kerr* v. *South Park Commissioners*, 117 U. S. 379, and *Shoemaker* v. *United States*, 147 U. S. 282, to wit, that a condemner is not liable for any increase in value due to its initiation of a project necessitating the taking of the property condemned. This rule is designed to prevent the owner from profiting from an
23 increase in market value due to speculation as to the amount the condemner might be compelled to pay for the property. The Supreme Court in *United States* v. *Miller*, page 377, thus stated the reason for the rule.

> * * * If their lands were probably to be taken for public use, in order to complete the project in its entirety, any increase in value due to that fact could only arise from speculation by them, or by possible purchasers from them, as to what the Government would be compelled to pay as compensation.

This rule, however, is limited to property lying within the scope of the project. If a parcel of land, not within the limits of the original project, gained in value by reason of its proximity to the public improvement, and if later it was decided to enlarge the project and to condemn this additional land, the increase in value due to its proximity to the project is not to be excluded in determining just compensation. This is because its increase in market value was not due to speculation as to what the owner might be able to compel the Government to pay for it, but to a natural increase in the value of the property on account of its environment, apart from any prospect of its condemnation by the Government.

In short, before any part of the market value of a piece of property is to be eliminated, it must appear that it was brought about by the prospect of its condemnation by the Government. So, for the case at bar to come within the rule of the *Miller* case, it would have to appear that it was known that the defendant had entered

upon a project that would probably result in the condemnation of plaintiff's vessel, and that this fact had caused the increase in market value. The outbreak of war alone and the resulting need of the Government for vessels generally do not bring the case within the rule. In addition it would have to appear, at the least, that it was the known program of the Government to condemn all vessels similar to plaintiff's vessel.

The proof falls far short of this. Many vessels similar to plaintiff's were left in private hands, and it was known they would be. Indeed, the Government itself had disposed of this very vessel seven months before. This was ten months after the outbreak of hostilities. There seemed to be no prospect of its being requisitioned. It is only the enhancement in value due to speculation on
24 account of the imminent prospect of requisition that is to be eliminated.

So much for the *Miller* case. The rules formulated for the guidance of the War Shipping Administration by the eminent jurists composing the President's Advisory Board on Just Compensation are entitled to great respect; but it must be remembered that these rules were promulgated for the guidance of an administrative body administering the Merchant Marine Act of 1936. That Act provided that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." In formulating rules for the guidance of an administrative body administering this Act this Committee, of course, could not run counter to this provision of the Act, and so in Rule 4 it was provided, in part, that "from the value at the time of taking there should be deducted any enhancement due to the Government's need of vessels which has necessitated the taking. * * *."

It is a recognized principle of the law of eminent domain that in determining market value there should be eliminated any special value incident to an owner's unwillingness to sell his land because of its special adaptability to his own use, and a taker's special need for the land because of its particular fitness for the taker's purposes. *United States* v. *Miller*, *supra*, p. 375. If the rule laid down by the Advisory Board be so limited, it is a correct statement of the law; but if it be interpreted to mean that the Government is not required to pay as much for property condemned as others were willing to pay for it for their own use, then it is not a correct statement of the law. If the owner could have sold the vessel to private parties for their own use for $15,500, certainly he is entitled to no less from the Government when it prevents him from making the sale by taking his property away from him.

We take it that the rule means no more than that any increment in value due to an owner's unwillingness to sell and the Govern-

ment's special need were to be eliminated. If it means more than this, it cannot be followed by the courts in fixing just compensation.

25 The elimination of enhancement in value due to previous takings of similar vessels or to the probable prospective taking of the particular vessel must be interpreted in the light of the rule reiterated in *United States* v. *Miller*, *supra*, which we have heretofore discussed. This means that if the taking of this vessel was within the reasonably probable scope of a program for the condemnation of vessels, known to have been initiated by the defendant, any increase in value incident to speculation as to what the Government might be required to pay is to be eliminated. That it was within the scope of the program might be evidenced by the taking of similar vessels or anything else that might show that the taking of this vessel was reasonably probable. An increase in value due to this prospect of condemnation is to be eliminated. But the proof shows that the condemnation of this vessel was not within any program adopted by the Government. There was no reasonable prospect of its condemnation. All indications were that the Government did not want this vessel.

We understood defendant to say in argument that the Merchant Marine Act of 1936, limiting the amount to be paid when vessels were requisitioned, was only a direction to the administrative agency, and that it was not intended to be binding on the courts when they are called upon to fix just compensation. It has been held that the determination of just compensation is a "judicial function, and [that] no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard." *United States* v. *New River Collieries*, 262 U. S. 341, 343-344, citing *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327. We assume the Act was passed with this longstanding limitation in mind and that it was not intended to lay down a rule binding on us.

We are of opinion that neither *United States* v. *Miller*, *supra*, the rules of the President's Advisory Board on Just Compensation, nor the Merchant Marine Act of 1936 require us to abandon or to modify in this case the standard of market value laid down by the Supreme Court in the cases cited *supra*. Since plaintiff could have gotten for his vessel $15,500 from private persons for their own use, he is entitled to no less from the Government.

26 Plaintiff is entitled to recover $15,500, plus compensation for delay in payment, computed at four percent per annum on this amount from October 15, 1942 until August 21, 1944, and on $8,750.00 from August 21, 1944 to date of payment. Against the aggregate the defendant is entitled to a credit of the amount

already paid by it of $6,750. Judgment for this amount will be entered. It is so ordered.

HOWELL, *Judge*; MADDEN, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Justice*, concur.

27-28 JUDGMENT OF THE COURT—January 5, 1948

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover.

It is therefore adjudged and ordered that plaintiff recover of and from the United States the sum of fifteen thousand five hundred dollars ($15,500), plus compensation for delay in payment, computed at four (4) percent per annum on this amount from October 15, 1942, until August 21, 1944, and on eight thousand seven hundred fifty dollars ($8,750) from August 21, 1944, to date of payment. Against the aggregate the defendant is entitled to a credit of the amount already paid by it of six thousand seven hundred fifty dollars ($6,750.00).

29-30 PROCEEDINGS AFTER ENTRY OF JUDGMENT

On March 2, 1948, the defendant filed a motion for a new trial.

On April 5, 1948, the court entered the following order on said motion:

ORDER

It is ordered this 5th day of April, 1948, that the defendant's motion for new trial be and the same is hereby overruled.

31 Clerk's Certificate to foregoing transcript omitted in printing.

☆ U. S. GOVERNMENT PRINTING OFFICE 1948 755489

Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1948

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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U. S. GOVERNMENT PRINTING OFFICE, 1948

SUPREME COURT U.S.
Office-Supreme Court, U.S.
JUL 28 1941

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above-entitled case on January 5, 1948.

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1948 (R. 18). A motion for a new trial, seasonably filed, was denied on April 5,

1948 (R. 18). The jurisdiction of this Court is invoked under the provisions of Section 3(b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the clause of Section 902 of the Merchant Marine Act, 1936, (the statute authorizing the wartime requisitioning of merchant ships) which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use" undertakes to bind the Court of Claims in determining the just compensation due an owner whose ship was taken under the Act.

2. If so, whether the clause is invalid as denying the "just compensation" required by the Fifth Amendment.

3. If the clause is valid and applicable to judicial determinations of just compensation, what is the measure of the enhanced value required to be excluded from such determinations.

STATUTE INVOLVED

The pertinent portions of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1242, are set forth in Appendix A, pp. 29-32.

STATEMENT

This is a suit under Section 902 of the Merchant Marine Act, 1936, as amended, to recover the balance of just compensation alleged to be due to

respondent from the United States for the requisitioning of his steamtug, the *MacArthur*, in October 1942 (R. 1-4).

The *MacArthur*, formerly the *Guthrie*, was built at Baltimore in 1895 for the Coast Guard. It was a small harbor boat used by the Coast Guard in Baltimore harbor, from 1895 to 1939, as a boarding tender or tug to transport immigration, customs, and health officers from the shore to vessels arriving in the harbor (R. 5-6). In the latter part of 1939, the *Guthrie* was transferred from Baltimore to the Coast Guard base at Portland, Maine (R. 7).

In September, 1941, a special Board of Survey, appointed by the Coast Guard to ascertain the vessel's condition and to make recommendations regarding her disposition or repair, reported that, under normal conditions and considering the vessel's age, the expense of putting her in operating condition would not be justifiable and the vessel should be placed out of commission, but that, in view of the emergency and the great need for vessels, certain designated repairs should be made so that three or four more years of satisfactory service could be had from the vessel (R. 7-8). However, Coast Guard Headquarters directed that the *Guthrie* be sold to the highest bidder in accordance with regulations (R. 8). The sale was advertised and conducted as an open-market transaction, and sealed bids were requested, but only three were received. Respondent was the highest bidder and

on March 19, 1942, the vessel was sold to him in Maine for the sum of $2,875 (R. 8).

During the period from March 19, 1942 to April 26, 1942, respondent caused certain repairs and improvements to be made to the vessel and purchased additional equipment. He expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had not respondent, who was experienced in performing and supervising such work and tried to keep the costs as low as possible, performed part of the work himself, with the aid of a crew of four. The remainder of the work was performed by a shipyard at Portland (R. 8-9). On April 20, 1942, respondent received from the Bureau of Marine Inspection and Navigation of the Department of Commerce a Certificate of Inspection which had been withheld pending completion of repairs on the boiler (R. 8). This certificate designated the vessel as a "towing steam vessel" and permitted it "to navigate for one year, the waters of bays, sounds, rivers and harbors" (R. 8). On April 21, 1942, the Department of Commerce issued a Consolidated Certificate of Enrollment and License authorizing respondent to employ the vessel in the coasting trade for one year (R. 9).

On completion of the repairs and improvements, the *Guthrie* was brought to New York under her own power, and after a few days at an East River pier, was moored at Staten Island, where she remained until taken by the United States. She did

not engage in any towing operations or commercial work at any time while in respondent's possession. The vessel's name was changed to *MacArthur* in New York, (R. 9).

Late in September, 1942, a naval officer surveyed the *MacArthur* to determine her suitability for use on the Navy's Eastern Sea Frontier as a steam heating plant for heating and pumping fuel oil from oil barges into naval combat vessels. This survey termed the vessel's condition, on the whole, to be "fair to good," estimated her original cost at $45,000 and replacement cost at $56,000, and appraised her present value at $9,000[1] (R. 9-10). On October 15, 1942, the War Shipping Administration requisitioned the vessel pursuant to Section 902[2] of the Merchant Marine Act of 1936, as amended, and took from respondent the entire ownership, possession, and use of the vessel, her equipment and spare parts (R. 5).[2] After her requisitioning, the vessel was used by the Navy

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[1] This appraisal was based on the opinion that the vessel had six years left of useful life, that her value should be depreciated during the remaining useful life at 3.3 per cent per year, and that she was accordingly now worth 19.8 per cent of her estimated cost, or about $9,000; market value was not taken into account in this appraisal (R. 10).

[2] Executive Order 9054, February 7, 1942 ("Establishing a War Shipping Administration in the Executive Office of the President and Defining Its Functions and Duties") (7 Fed. Reg. 837, 3 CFR, Cum. Supp. (1943) pp. 1086-8) transferred certain powers and functions of the Maritime Commission under the Merchant Marine Act, including those pertaining to requisition, to the War Shipping Administration. Section 202 of the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 Stat. 481, 501, retransferred these powers to the Maritime Commission as of August 30, 1946.

at the docks of the Eastern Sea Frontier for furnishing steam to heat oil for use in combat vessels (R. 10).

The War Shipping Administration determined the amount of $9,000 to be just compensation for the *MacArthur*, and on May 18, 1946, offered that sum to respondent (R. 5). In making this determination, the Administration was guided by the 1941 Coast Guard survey rendered before sale of the vessel to respondent (*supra*, p. 3), by the September 1942 naval survey immediately prior to the requisitioning (*supra*, p. 5), and by the rules established by the Advisory Board on Just Compensation (R. 11).[3] Respondent accepted 75%

[3] Executive Order 9387, October 15, 1943 ("Establishing An Advisory Board on Just Compensation and Prescribing Its Functions") (8 Fed. Reg. 14105, 3 CFR 1943 Supp., ch. II, pp. 48-9) established an Advisory Board on Just Compensation, consisting of Judges Learned Hand, John J. Parker, and Joseph C. Hutcheson, Jr., to aid in the determination of just compensation to be paid by the War Shipping Administration for requisitioned vessels. The Order provided in part:

> "4. The Board, in accordance with the applicable provisions of the Constitution and the laws of the United States, shall establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned, purchased, chartered or insured by the Administration. The Board may prescribe such rules, regulations and procedures as it deems necessary or advisable in carrying out its functions.
>
> 5. In determining the amount of just compensation, which should be paid for each vessel, the War Shipping Administration will be guided by the general standards, rules and formulae established by the Board."

On December 7, 1943, the Board submitted to the Administrator of the War Shipping Administration its report, containing the rules for the determination of just compensation which are set forth in Appendix B, *infra*, pp. 33-38.

of the Administration's award ($6,750), and brought this suit under Section 902 of the Act to recover the balance of $20,000, alleged to be the amount respondent was entitled to receive as just compensation, plus interest (R. 4, 5).

The Court of Claims found that the "fair market value of the *MacArthur* at the time and place of the taking was $15,500.00" (R. 12). There then existed in and about the Port of New York "a rising market and a strong demand for tugs of all types, including the *MacArthur*," but most tug owners were reluctant to sell because of the greatly increased business. From August, 1941 to February, 1943, six tugboats were sold on the open market in that area, but none of these sales involved a vessel closely comparable to the *MacArthur* in design, power, and equipment (R. 11-12). The Court of Claims also found (R. 12-13):

> Beginning on September 8, 1939, the date on which the President proclaimed the existence of a limited national emergency, and continuing up to the date that plaintiff's vessel was requisitioned, there was a general rise in the market values of nearly all vessels in and about the Port of New York. This increase in values between September 8, 1939 and May 27, 1941, the date on which the President proclaimed the existence of a general national emergency, was due to the demand for vessels which followed the outbreak of war in Europe. After May 27, 1941 and particularly after December 7, 1941, the date of the Japanese

attack on Pearl Harbor, the rise in market values was due to the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic which occurred during the period of the war. These conditions combined to create a demand for and a shortage of tugs. As a result, the market value of the *MacArthur* had been enhanced by the sum of $5,000.00 by October 15, 1942.

Prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect.

Judgment was granted for the sum of $15,500, plus interest, less the amount already paid by the United States (R. 13, 18).

The Court of Claims stated, in its opinion, that it was not possible to allocate the $5,000 of "enhanced value" between, first, "the great increase in shipping and harbor traffic due to the war," and, secondly, "the government's need for vessels in the prosecution of the war, which necessitated the requisitioning of many of them"; but it also stated that even if it were possible to make such an allocation, the United States would not be entitled to a deduction from market value on account of enhancement attributable to its need for vessels in the prosecution of the war (R. 14). The court held that just compensation requires the Government to pay the property owner the price he could

have secured from someone else, and that respondent could have obtained $15,500 from other willing purchasers.[4] The "enhancement value" clause of Section 902(a)—the clause which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use"—was held not to be binding on the courts, but only on the administrative agency, since the determination of just compensation was said to be solely a judicial function, and that it must be presumed that the Merchant Marine Act was passed with that principle in mind (R. 14, 16, 17).

Since the Court of Claims' opinion indicated that it might have rested on a concession by government counsel that the "enhancement value" clause of Section 902(a) was not binding, or intended to be binding, on the courts (R. 17), the United States filed a motion for a new trial, in which it was pointed out that it was the government's position that (a) the "enhancement value" clause of Section 902(a), properly construed, was binding on the courts, including the Court of Claims, in determining just compensation, and (b) the statute, so construed, was valid and constitutional. This motion for a new trial was denied, without opinion, on April 5, 1948 (R. 18).

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[4] The United States did not, and does not now, contest the finding that on October 15, 1942, respondent could have sold the vessel to other potential purchasers for $15,500.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the "enhancement" clause of Section 902(a) of the Merchant Marine Act, 1936, as amended, does not undertake to bind the courts when they are called upon to fix just compensation for vessels requisitioned under that Act, and in failing to hold that the court was required to determine such just compensation in accordance with the terms of the "enhancement" clause.

2. In failing to hold that the "enhancement" clause of Section 902(a) of the Merchant Marine Act, 1936, as amended (construed so as to be applicable to judicial determinations of just compensation under that Act) is constitutional and valid.

3. In holding that respondent should recover, on account of the taking of his vessel, the full market value of the vessel as of the time and place of taking, regardless of the amount by which that market value was enhanced by the causes necessitating the taking.

4. In failing to find the sum by which the vessel's market value at the time and place of taking (as found by the court) was enhanced by the Government's need for vessels in the prosecution of the war which necessitated the requisitioning of many of them, and in failing to reduce the amount awarded to respondent by the enhanced sum.

5. In entering judgment for respondent in the amount in which it was entered.

REASONS FOR GRANTING THE WRIT

In holding that the "enhancement" clause of Section 902(a) of the Merchant Marine Act "was not intended to lay down a rule binding" on the courts, but was merely a "direction to the administrative agency" which is without significance in a judicial proceeding to fix just compensation, because such a determination is solely a "judicial function" (R. 17), the Court of Claims has largely devitalized an important Congressional effort to control excessive war profits and to assure the Government in wartime of adequate shipping facilities at fair prices. This decision has great present and potential importance, and, in our view, constitutes both a serious misinterpretation of the Merchant Marine Act and a misapplication of the Fifth Amendment's requirement that "just compensation" be paid for a taking of private property for public use.

1. The important questions raised by the Court of Claims' categorical refusal to apply the "enhancement" clause to its own just compensation determinations warrant review here. There are now about seventy suits in that court, and several in the various district courts, for just compensation for the taking of merchant vessels under Section 902 of the Merchant Marine Act, and in almost all

of these cases judicial application of the "enhancement" clause would materially affect the awards. In addition to this large bloc of cases directly affected by the present statute and by the instant decision, the lower court's suggestion that application of the "enhancement" clause to judicial proceedings would render the statute unconstitutional presents the broader question—of great significance to all wartime exercise of eminent domain—of the power of Congress to define the proper measure of "just compensation" for war requisitioned property so as to exclude inflation of values stemming from the Government's large and pressing needs for supplies and equipment. This is the method of eliminating undue war profits which Congress deliberately adopted, in 1936, with respect to the single field of merchant vessels, and the lower court's adverse judgment on that statute, if allowed to stand, would cast serious doubt on the validity and availability of this means of controlling war profiteering and limiting war costs.

2. The text and legislative history of Section 902 demonstrate that the "enhancement" clause was designed to apply to judicial determinations of just compensation, as well as to the initial administrative award, if that could constitutionally be done. Section 902(a) states the limitation in general words, as a partial definition of just compensation, and without any indication that it is to govern

only the administrative proceedings.[5] Subsection (d) provides for initial determination and payment of the "just compensation authorized by this section" by the Maritime Commission, and then entitles a dissatisfied owner to accept 75% of the administrative award and to bring suit for "such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor * * *." The latter language, pertaining to the courts, does not purport to alter or exclude the definition of just compensation contained in subsection (a), and it is clear, from the text of the two paragraphs alone, that the measure of compensation was to be the same for the courts as for the Commission. Moreover, it is inconceivable that a Congress, intent on precluding payment of excess wartime values, would have nullified its purpose by directing the "enhancement" restriction solely to the administrators; if that were the statutory design, owners of ships of substantially enhanced value would automatically refuse Commission awards and resort to the courts to secure the additional compensation denied them administratively under the statute.

The legislative history of the clause confirms this reading. As it was passed in 1936, Section 902 of

[5] "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use."

the Merchant Marine Act required the payment of the "*fair actual value*" of requisitioned vessels which had not been subsidized by the Government (*i.e.* on which a construction differential subsidy had not been paid), "and in no case shall such fair actual value be enhanced by the causes necessitating the taking"; the Commission was to "ascertain the *fair* compensation for such taking or use" and a dissatisfied owner was authorized to sue the United States "for the amount of such *just* compensation" (italics supplied). 49 Stat. 1985, 2015-2016.[6] The sparse legislative history relevant to the

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[6] In brief, the legislative history of the "enhancement" clause (from 1916 to 1936) is as follows. Section 10 of the Shipping Act of 1916 (Act of September 7, 1916, 39 Stat. 728, 731) empowered the President to requisition "any vessel purchased, leased, or chartered" from the United States Shipping Board, and provided for the payment of "the fair actual value *based upon normal conditions* at the time of taking * * *" [This provision was repealed by Section 903(a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 2016]. In 1922, in the 67th Congress, various merchant marine bills were introduced (H.R. 10644, H.R. 12021, H.R. 12817) which contained an "enhancement" clause with substantially its present wording; however, these bills limited the requisitioning powers to vessels which had been owned or financially aided by the Federal Government; all of these bills failed of enactment [see H. Rept. No. 1112, 67th Cong., 2d Sess., pp. 18, 29; S. Rept. No. 935, 67th Cong., 4th Sess., pp. 24, 35; 63 Cong. Rec. 97, 367-8]. In the 68th Congress, the House of Representatives appointed a Select Committee of Inquiry into Operations, Policies and Affairs of the United States Shipping Board Merchant Fleet Corporation, which held extensive hearings; this Select Committee's report to the 69th Congress (H. Rept. No. 2, 69th Cong., 1st Sess., pp. 31-32, 35) referred to the "fabulous" prices paid for vessels in World War I and recommended amendment of Section 10 of the Shipping Act of 1916, *supra*; "so as to clearly and specifically provide that in the event of a future national emergency and the need for such [Shipping Board] ships for national defense, the Government could take them over on the basis of charter rates prevailing before the emergency arose, or at the world market value of such ships

extension of the "enhancement" clause to unsubsidized vessels contains nothing to indicate that the clause, despite the statutory text, was to be read as inapplicable to judicial proceedings. 80 Cong. Rec. 9885, 9920-9921, 10077. On the other hand, the plainly evinced Congressional purpose to use the clause to avoid the payment of the high prices

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before the emergency arose." The 70th Congress enacted the Merchant Marine Act, 1928, 45 Stat. 689, Section 702 of which (45 Stat. 697) authorized the requisitioning of government-aided vessels and provided for the payment of the "fair actual value of the vessel at the time of taking" with the proviso that such fair actual value should not be "*enhanced by the causes necessitating the taking.*" On this provision, the few pertinent materials are H. Rept. No. 1649, 70th Cong., 1st Sess., p. 10 (conference report); 69 Cong. Rec. 7916-7917 (Cong. Davis), 7918 (House debate). In 1935 and 1936, several merchant marine bills were introduced into the 74th Congress (*e.g.*, H.R. 7521, H.R. 7981, S. 2582, S. 3376, S. 3500, S. 4110, S. 4332, H.R. 8555); H.R. 8555 was the only bill to reach debate and it became the Merchant Marine Act, 1936, 49 Stat. 1985. As it was reported to the House of Representatives, H.R. 8555 authorized the requisitioning only of government-aided vessels, and, in that connection, contained an "enhancement" clause in the same terms as the 1928 Act and as finally adopted in the 1936 Act. H. Rept. No. 1277, 74th Cong., 1st Sess., pp. 26, 33. As passed by the House, the requisitioning provisions of the bill were still limited to government-aided vessels, the "enhancement" clause was included, but it was also provided that no more than the ship's cost less depreciation could be paid upon taking. 79 Cong. Rec. 10200. As initially reported to the Senate, H.R. 8555 apparently contained similar provisions. S. Rept. 1226, 74th Cong., 1st Sess. After it had been reported to the Senate, the bill was amended to permit the requisitioning of documented vessels which had not been federally aided, and the "enhancement" clause, in the terms in which it appears in the 1936 act, was made applicable to requisitions of such vessels. 80 Cong. Rec. 9885, 9920-9921, 10077. A different provision, derived from the cost maximum inserted in the bill on the House floor, was made for payment upon the requisitioning of vessels upon which a construction differential subsidy had been allowed (*i.e.*, subsidized vessels), and the bill became law in this form. Sec. 802, 902(b), 49 Stat. 2011, 2016 (All italics supplied).

for requisitioned tonnage which had been paid in World War I compels the construction that the courts were included. In 1939, doubts had arisen as to the statute's validity under the Fifth Amendment because of its use of "fair actual value" in lieu of "just compensation," and the section was amended to read as it now does. 53 Stat. 1255-1256. But it was expressly pointed out, both to the House of Representatives and to the Senate, that the "changes also retain the injunction now carried in section 902 that the value of the property taken and used shall not be enhanced by the causes necessitating the taking and use." H. Rept. 660, 76th Cong., 1st sess., p. 4; S. Rept. 678, 76th Cong., 1st sess., p. 4; 84 Cong. Rec. 6105, 10626. And there is no intimation in the debates or reports that the "enhancement" clause was henceforth to be restricted to the administrative award.[7] The most that can be said is that there may have been some doubt that the clause could validly apply in judicial determinations of just compensation but

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[7] These 1939 changes were suggested by the Maritime Commission, which took the position that retention of the terms "fair actual value" might lead to a holding that the constitutional measure of just compensation had been denied. At the committee hearings, the chairman of the Commission pointed out that the "enhancement" clause was retained, and added:

> It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts.

(Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st Sess., on H.R. 4983, April 27, 1939, p. 10).

there was no deviation from a clear purpose to continue the provision's application to such proceedings, if the Constitution permitted. In the face of this text and legislative history, to restrict the clause to Commission awards, as the Court of Claims did, because of doubt as to its validity when judicially applied, can be no more than formal reliance on the canon that statutes should be construed so as to sustain validity. For here such an interpretation is wholly equivalent to a direct holding of unconstitutionality, since, in this instance, the results of following the canon or of directly disallowing the statute are exactly the same.

3. The validity of the "enhancement" clause is supported by a proper construction of the Fifth Amendment, taken together with Congressional authority under the war power.[8] At least when the

[8] Since the Court of Claims held the clause inapplicable to its own proceedings, it did not canvass the various constructions, current and possible, of the enhanced value excluded by the clause. One interpretation, that of the Comptroller General, is that the clause prohibits the payment of compensation to the extent that it may be based upon values in excess of those existing on September 8, 1939 (the date of the President's proclamation of a limited national emergency), provided that such excess be determined as due to economic conditions directly caused by the national emergency. 22 Comp. Gen. 497, 608. A second construction, announced by the Advisory Board on Just Compensation in December, 1943, (Appendix B, *infra*, p. 36) and since followed by the War Shipping Administration (in this and other cases), and by the Maritime Commission, defines the excluded enhanced value as that "due to the government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect occurred before or after the declaration of the national emergency of May 27, 1941," but not including enhancement due to a general rise in

takings are for war or defense purposes, we believe that Congress has power, within limits, to define the measure of just compensation; and that the particular measure chosen here falls within the bounds of this legislative function. The Court of Claims' contrary view rests on the twin assumptions, first, that the determination of just compensation is solely for the courts, and, secondly, that an award less than the sum the owner could secure from a private purchaser—the "current market price"—cannot constitute just compensation. In our view,

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prices or earnings of merchant vessels, or other commodities or property. A third interpretation, occasionally advanced, is that the clause does no more than incorporate, and goes no further than, the existing judicially developed doctrines of just compensation, especially as recently elaborated in *United States* v. *Miller*, 317 U. S. 369. This third constructi... may be set to one side as plainly contrary to the avowed Congressional purpose to authorize awards substantially less than those allowed by the courts after World War I (*supra*, pp. 13-17), and as out of harmony with the statute's wording and history. The first two interpretations have been forcefully supported and argued continuously since 1943.

Although the Court of Claims did not detail its understanding of the meaning of the clause, it found (R. 12-13) that (a) values of merchant vessels were enhanced between September 8, 1939, and May 27, 1941, by "the demand for vessels which followed the outbreak of war in Europe," (b) such values were enhanced after May 27, 1941 (and particularly after December 7, 1941) by (i) "the government's need for vessels, *which necessitated the taking of many vessels*" (italics supplied), and (ii) "the great increase in shipping and in harbor traffic which occurred during the period of the war." The court concluded that the value of the *MacArthur* had been enhanced by the sum of $5,000 by the date of taking, October 15, 1942 (R. 13). Its opinion (R. 14) and its reference to the Advisory Board's rules (R. 15, 16-17), indicate that the court probably followed the Advisory Board's view in holding that the clause excluded only enhancement attributable to "the government's need for vessels in the prosecution of the war, which necessitated the requisitioning of many of them" (R. 14).

both of these contentions, though finding some support in prior judicial statements, are basically unsound.

a. The Fifth Amendment requires that "just compensation" be paid for all private property taken for public use, but it does not suggest that the federal courts alone are to develop the measures and methods of ascertaining "just compensation." Where Congress has left the determination of just compensation wholly to the courts, as has usually been the case, the judiciary must, of course, decide for itself what compensation the Constitution requires (cf. *United States* v. *John J. Felin & Co., Inc.*, October Term, 1947, No. 17, decided June 14, 1948); but that is not to say that the legislature, when it wills, cannot establish measures and methods which must be tested, not by their consonance with these detailed standards developed by the courts independently of legislative direction, but against the broad constitutional conception of "just compensation" itself. There is nothing in the Fifth Amendment denying to Congress a right, equal to that of the courts, to elaborate the content of "just compensation" in particular circumstances, or forbidding Congress reasonably to differ from the courts as to the proper measure of an award, provided always that the fundamentals of justice and fairness, embodied in the phrase "just compensation," are not violated. Cf. *Al-*

brecht v. *United States*, 329 U. S. 599, 602-603.[9] In developing the governing judicial measures of just compensation, this Court has been quick to mold the rules to conform to its conception of fairness, and has often rejected, because of the demands of equity, merely mechanical or mathematical standards.[10] Since such ideas of equity, justice, and fairness necessarily inhere in a determination of just compensation, we believe that the Constitution does not wholly foreclose Congress,

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[9] In determining the issue of whether property is being taken for a "public use," a requirement which the Fifth Amendment likewise imposes, the settled federal rule is that the legislative declaration is entitled to nearly conclusive weight. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66; *Barnidge* v. *United States*, 101 F. 2d 295, 298-299 (C.C.A. 8).

Similarly, it is now axiomatic that, in applying the comparable constitutional requirement of no deprivation of property without "due process of law," the courts pay great heed to legislative and administrative determinations. Cf. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 *et seq.* (Brandeis, J., concurring); *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; *R. R. Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Miller* v. *Schoene*, 276 U. S. 272; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Munn* v. *Illinois*, 94 U. S. 113.

[10] *United States* v. *Miller*, 317 U. S. 369, at 373-377, summarizes the current rules, with great emphasis on the requirements of "fairness"; for instance, the Court states: "Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must *in fairness* be eliminated in a condemnation case . . ." (317 U. S. at 375; italics supplied.) See also, *United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266, at 279, 280; *United States* v. *Petty Motor Co.*, 327 U. S. 372, at 377-378; *United States* v. *John J. Felin & Co., Inc.*, October Term, 1947, No. 17, decided June 14, 1948.

the primary policy-making organ of the Federal Government, from implementing its own views of adequacy and justice. Legislative standards must, of course, abide by the sovereign conception of the Fifth Amendment, but they should not be thrust aside solely because Congress is their source, or because they depart from the judicially developed rules, which may represent the dominant part of the Constitution's general conception of "just compensation" but surely do not exhaust it.

We recognize that in 1893, in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, the Court stated that the "measure of compensation * * * is a judicial and not a legislative question" and that the "question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation."[11]. But we urge that, in view both of the purposeful adoption by the 1936 Congress of the "enhancement" clause after a long gestation period, and of the great importance of the ques-

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[11] This principle is quoted or paraphrased in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301; *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 365, 367. But cf. *Bauman* v. *Ross*, 167 U. S. 548, 569, 573 (upholding a statute requiring offset of benefits to owners' remaining lands).

tion, this *Monongahela* principle be reexamined, and discarded or qualified.[12]

b. The Court of Claims intimates that the vice of the "enhancement" clause lies in its subtraction of a sum from the vessel's current market value. (R. 17). That is concededly the effect of the statute in this and many other cases, but invalidity does

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[12] The *Monongahela* case may not mean anything more, on this point, than that the legislative measure must be subject to some measure of judicial scrutiny. If it does mean that legislative rules of compensation have no place whatsoever, the decision rests solely on an *obiter* quotation from an early concurring opinion of a single justice in a case coming from a state court (McLean, J., in *Charles River Bridge Props.* v. *Warren Bridge Props.*, 11 Pet. 420, 571), and on three state cases, one of which (*Com.* v. *Pittsburgh & C. R. Co.*, 58 Pa. 26, 50) holds no more than that the legislative measure was invalid as entirely unreasonable, another of which (*Penn. Rd. Co.* v. *Balt. & Ohio Rd. Co.*, 60 Md. 263, 269) stands on a unique state constitutional provision, and the third (*Isom* v. *Mississippi Central Rd.*, 36 Miss. 300, 315) adopts a substantive rule regarding consideration of benefits which was later rejected by this Court in *Bauman* v. *Ross*, 167 U. S. 548.

Nineteenth century judicial expressions of the binding nature of legislative measures of just compensation are not lacking. See *McMasters* v. *Commonwealth*, 3 Watts 292, 295 (Pa. 1834) ("As the legislature have the undoubted right to determine when the public interest requires the assumption of private property, so it seems to me the better construction of the constitution, that it shall rest in their wisdom to determine the nature and kind of the compensation to be made, and also to point out the tribunal by whom the amount may be ascertained."); *Fenelon's Petition*, 7 Pa. 173, 175 (1847) ("Compensation must be made when private property is taken for public use, but the mode, manner and *criteria* of amount of that compensation is not a matter for judicial, but by legislative proceeding."); *Chesapeake & O. Canal Co.* v. *Key*, Fed. Cas. No. 2649, 5 Fed. Cas. 563, 564 (C.C.D.C. 1829) ("But the constitution only provides for the general principle. The means of ascertaining the just compensation were left to be decided by the public authority, which should give the power to take private property for public use").

not follow as of course from a failure to award current market value. For instance, the system of judicial rules for determining just compensation requires deductions from current market value for benefits to the owner's remaining property (*Bauman* v. *Ross*, 167 U. S. 548), for value arising from the owner's desire to retain the property or from the taker's special need (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 76; *United States* v. *Miller*, 317 U. S. 369, 375), for increased value resulting from the initiation of the condemnation project (*United States* v. *Miller, supra,* at 376-377), as well as for value attributable to the owner's state-created privilege to use the power of eminent domain (*United States ex rel. T.V.A.* v. *Powelson*, 319 U. S. 266). In these cases, considerations of equity and fairness have impelled courts to award a condemnee less than he could have secured from "private persons for their own use" (R. 16). In Section 902(a), Congress has determined, in the direct light of governmental experience with requisitioned ships in World War I, that equity and fairness require a shipowner to accept, in times of war or of a national-defense emergency, less than his ship's current market value, to the extent that that value has been "enhanced by the causes necessitating the taking." This measure of compensation—entirely comparable to that adopted in World War II by other com-

belligerent nations—[13] was designed to eliminate war profiteering,[14] and to cut down inflated war-time scarcity prices for vessels urgently needed by the Government, at the same time according the owner fair compensation at normal price levels. *Supra*, pp. 12-17. Congress has thus given its reasonable interpretation of the traditional eminent domain concept of "*fair* market value," which this Court has said denotes what "it fairly may be believed that a purchaser in *fair* market conditions would have given." (*New York* v. *Sage*, 239 U. S. 57, 61), or, on another occasion, "market value *fairly* determined." *Olson* v. *United States*, 292 U. S. 246, 255. See *United States* v. *Miller*, 317 U. S. 369, 374-375. [Italics supplied.] In one sense, what Congress did was to adapt, enlarge, and elaborate

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[13] The British Compensation (Defense) Act, 1939 (2 & 3 Geo. 6, ch. 75, Sept. 1, 1939), provided in Section 4 that "no account shall be taken of any appreciation in the value thereof [*i.e.*, of "vessels, vehicles, or aircraft"] due to the emergency"; the Canadian Compensation (Defense) Act, 1940 (4 Geo. VI, ch. 28, August 7, 1940), provided that "no account shall be taken of any appreciation in the value thereof [*i.e.*, vessels and aircraft] due to the war"; Article 23 of the French law of July 11, 1938 (concerning wartime requisition, *inter alia*) provided that "* * * the indemnities due as a result of requisition shall be calculated by taking account only of the actual loss which the definitive or temporary dispossession imposes on the prestator [*i.e.*, owner] on the day of requisition, exclusive of the profit which the free disposition of the property might procure him, and of any rise in prices produced by speculation or monopoly or any other circumstances imputable to the state of war or of external tension." See Wise, *Requisition in France and Italy* (1944), pp. 13-14, 20, 49-51, 85.

[14] Respondent, for example, invested a total of $8,574.78 in the *MacArthur* (R. 8-9), and the court below awarded him $15,500; this amounts to a profit of approximately 80% after an ownership of seven months.

the judicial "just compensation" rule, recently applied by this Court in *United States* v. *Miller*, *supra*, that the owner is not entitled to the increment of value due to the initiation of the general project for which his property is later taken.[15] Section 902 of the Merchant Marine Act announced, in 1936, that thereafter in times of national emergency the Government's need for vessels might well require the undertaking of a general federal shipping project in which many merchant vessels might be taken, and that, in such event, the owner of a ship which happened to be requisitioned as part of the general project could not claim any increment of value attributable to "the causes necessitating the taking," or the initiation of the general project. Congress was fully entitled, we believe, to mark this measure of award as adequate, reasonable, and fair—as properly the just compensation prescribed by the Constitution.[16]

[15] State just compensation cases applying this rule are *e.g.*, *Dorgan* v. *City of Boston*, 94 Mass. 223, 251; *Benton* v. *Brookline*, 151 Mass. 250, 257-258; *May* v. *City of Boston*, 158 Mass. 21, 29-30; *St. Louis Electric Terminal Ry.* v. *MacAdaras*, 257 Mo. 448, 463-469.

[16] The intrinsic fairness of the "enhancement" clause is attested not only by the similar English, Canadian, and French requisition provisions cited in footnote 13, p. 24, *supra*, but also by the proposals of the (British) Expert Committee on Compensation and Betterment (Uthwatt Committee) in 1941-1942 (1) that all land taken in England for post-war reconstruction be valued by the "standard of 'pre-war values,'" *i.e.*, values as of March 31, 1939, and (2) that the 1919 statutory rules as to compensation for land-takings be amended specifically to provide that "no account shall be taken of any increased value or element of value arising from the actual or possible demands for the land or other land by any government de-

Authority to take this legislative step flows not only from the Fifth Amendment and the general federal eminent domain power, but even more importantly from the Government's war power which vests Congress with full right "to protect the nation against war profiteering" (*United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309; *Lichter* v. *United States*, Oct. Term, 1947, No. 105, decided June 14, 1948), and permits extensive control over the lives, liberties, and properties of men unknown to more normal times. *Lichter* v. *United States*, *supra*, slip sheet opinion, pp. 11-13, 22-25, 35-39; *Bowles* v. *Willingham*, 321 U. S. 503, 517-519. Certainly that power, which has amply sustained the Renegotiation Act (56 Stat. 245, 982; 58 Stat. 78), provides a firm base for the similar legislative declaration that, in time of war or of a national defense emergency, *just* compensation does not include payment for an excess of value stemming from the nation's crisis. "In total war it is necessary that a civilian make sacrifices of his property

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partment, local or public authority, or any statutory undertaker; or arising from the existence of or proposals for, or the probability or possibility of the land or other land becoming subject to, any public scheme of development, redevelopment, or reconstruction (including schemes of preservation from development) or from any works done or to be done or any change of user under any such scheme." See Interim Report (dated 25th April 1941), Cmd. 6291, pp. 4-5; Final Report (dated 14th August 1942), Cmd. 6386, pp. 77-79, 80-81, 86, 103. The proposal as to a March 31, 1939, ceiling on land values was adopted by the British Government in July 1941, and enacted into legislation (for a five-year period) by Section 57 of the Town and Country Planning Act, 1944, 7 & 8 Geo. 6, ch. 47.

and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." *Lichter* v. *United States*, *supra*, p. 11.

4. The instant case is appropriate for presentation and decision of these important questions of constitutionality and statutory interpretation. Although the Court of Claims did not apply the "enhancement" clause to its own determination, it did make an express finding that the vessel's market value, at the date of taking, was substantially enhanced "due to the demand for vessels which followed the outbreak of war in Europe," "to the government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and harbor traffic which occurred during the period of the war" (R. 12-13). If the "enhancement" clause should properly be considered in the making of the judicial award, some, at least, of this enhancement must be eliminated. The controversy is thus sharp, distinct, and incapable of settlement without resolution of the issues presented here. In view of its holding that the clause was not intended to apply to its proceedings, the court below did not pass upon the question of the proper interpretation of the clause as a substantive rule. See *supra*, pp. 17-18, fn. 8. That question of law is open for decision here, although not fully canvassed below; but it is plainly an issue which will not be determined in the Court

of Claims in succeeding ship requisition cases unless that court is reversed in the instant case.[17] In our view, the importance of the matter to pending litigation makes a determination here of the clause's substantive content preferable to a remand which will elicit no significant new facts or findings bearing on the issue. In any case, if the first two constitutional and statutory questions presented by this petition are decided in favor of the United States, the court below could be directed to determine the remaining issue of the statute's meaning free of the views expressed in its instant opinion.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1948.

[17] Cf. *Wilson Line, Inc.* v. *United States*, C. Cls., No. 46184, decided June 28, 1948.

APPENDIX A

The pertinent portions of the Merchant Marine Act, 1936 (Act of June 29, 1936, c. 858, 49 Stat. 1985), as amended by the Act of June 23, 1938, c. 600, sec. 33, 52 Stat. 962, and the Act of August 7, 1939, c. 555, sec. 3, 53 Stat. 1255, 46 U.S.C. 1212, 1242, provide as follows:

SEC. 802. Every contract executed by the Commission under authority of title V of this Act [*i.e.*, "Construction-Differential Subsidy"] shall provide that—

In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction-differential subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels, or the fair and reasonable scrap value of such vessel as determined by the Commission, whichever is the greater. Such determination shall be final. In computing the depreciated value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the Bureau of Internal Revenue for income-tax purposes.

The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.

SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of any

vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States shall

pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U.S.C., 1934 edition, title 28, secs. 41, 250).

* * * * * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any department or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund stablished by section 206 of this Act.

APPENDIX B

Letter of Transmittal and Report of Advisory Board on Just Compensation

Advisory Board on Just Compensation,
Washington, D. C., December 7, 1943.

Dear Admiral Land: We are herewith enclosing our report as the Advisory Board on Just Compensation. In it we have set forth in the form of rules the standards and principles to be observed, in respect of the valuation of vessels requisitioned for title or use by the United States, and in the disposition of matters which have arisen and will arise in connection with the granting of insurance upon and the voluntary chartering of vessels.

In arriving at the conclusions the rules embody we have been greatly aided by the material contained in Document 20, in the hearings before the Bland committee, and by the arguments and briefs filed at the public hearing held on November 26 and 27. Because of the full and exhaustive character of these aids to our deliberations, our labors have been greatly lightened, the time required for them has been shortened, and our confidence in the correctness of the rules we have embodied in our report as our best judgment in the premises has been greatly enhanced.

It seems appropriate to comment briefly on the Comptroller General's ruling of November 28, 1942. Contrary to the impression existing in many quarters, the Comptroller General does not limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the determination of values. The necessity of allowing subse-

quent enhancement that is not directly caused by economic conditions resulting from the emergency is specifically recognized by him. This standard does not necessarily exclude subsequent enhancement which directly reflects the economic changes incident to the improvement in general conditions since 1939.

It is obviously impossible to know without very extensive inquiry into the facts to what extent any enhancement in value was due to that cause, and the order which created the Board confined its duties to the establishing of "standards, rules, and formulae." On this account we did not undertake to consider how far the rules we are submitting would in practice reach different results from the rules recommended by the Comptroller General. It is conceivable that in application the difference might turn out to be far less than has at times been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

We have been greatly impressed not only with the care and consideration which the record discloses that both you and the Comptroller General have given to the matters involved, but with the moderation and judgment exercised by all concerned in endeavoring to work out a solution consistent with the interest of the United States and the justice of the case. In closing we take this opportunity to record our great appreciation of the fact that this has been so.

Respectfully,

(Signed) LEARNED HAND.
(Signed) JOHN J. PARKER.
(Signed) JOSEPH C. HUTCHESON, JR.

ADMIRAL EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the order of the President of October 15, 1943, establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States," establishes "fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned, purchased, chartered, or insured by the Administration."

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest. Value means value on the American market, not on foreign markets.

Rule 2.—In the case of requisition of foreign-flag vessels under Public L. v 101, just compensation should be determined as in the case of domestic vessels.

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a con-

sideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

Rule 5.—The enhancement clause of section 902(a) of the Merchant Marine Act of 1936, has no application to the valuation of chartered vessels for the purpose of insurance.

Rule 6.—The enhancement clause of section 902(a) has no application to voluntary charters or purchases under Public Law 101.

Rule 7.—In the event of loss due to a risk assumed by the United States in connection with the use of any vessel where no valuation or other mode of compensation has been agreed to, just compensation should be determined on the basis of value on the date of such loss. Where a redetermination or readjustment of rates or values is effected pursuant to the terms of a charter or other agreement, just compensation should be determined as of the date of redetermination. In both cases the determination is subject to deduction on account of enhancement, if any, as hereinabove set out in rule 4.

Rule 8.—Section 902(b) of the Merchant Marine Act of 1936 has no application to vessels merely because they have received mail subsidies under the act of 1928. The section has application only to vessels which have received a construction-differential subsidy under title V of the Merchant Marine Act of 1936; and a mail subsidy is not a construction-differential subsidy within the meaning of section 902(b) of the act.

Rule 9.—Valuations agreed upon by the Administrator and owners are binding, if not in excess of just compensation determined as above prescribed; and settlements should be made on the basis of such valuations with an allowance for any actual loss due to the delay in payment from the

date when such settlements would have been made, if no objections had been raised, not exceeding the current commercial rate of interest.

Rule 10.—Agreements fixing compensation for the title or use of vessels are not binding in the valuation of vessels of owners not parties to the agreements. Such valuations, however, if freely arrived at, may be considered along with other factors as some evidence of value.

LEARNED HAND.
JOHN J. PARKER.
JOSEPH C. HUTCHESON, JR.

DECEMBER 7, 1943.

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Brief for the U.S.

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No. 132

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims (R. 13–18) is reported at 110 C. Cls. 66.

JURISDICTION

The judgment of the Court of Claims was entered on January 5, 1948 (R. 18). A motion for a new trial, seasonably filed, was denied on April 5, 1948 (R. 18). The petition for a writ of certiorari was filed on June 29, 1948, and granted on October 11, 1948 (R. 19). The jurisdiction of this Court rests upon the provisions of Section 3 (b) of the Act of February 13, 1925, as amended (now repealed), and upon 28 U. S. C. 1255(1).

QUESTIONS PRESENTED

1. Whether the clause of Section 902 of the Merchant Marine Act, 1936, (the statute authorizing the wartime requisitioning of merchant ships) which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use" undertakes to bind the Court of Claims in determining the just compensation due an owner whose ship was taken under the Act.

2. If so, whether the clause is invalid as denying just compensation, as prescribed by the Fifth Amendment.

3. If the clause is valid and applicable to judicial determinations of just compensation, what is the measure of the enhancement in value required to be excluded from such determinations.

STATUTE INVOLVED

The pertinent portions of the Merchant Marine Act, 1936, as amended, 46 U. S. C. 1242, are set forth in Appendix A, pp. 129–134.

STATEMENT

This is a suit under Section 902 of the Merchant Marine Act, 1936, as amended, to recover the balance of just compensation alleged to be due to respondent from the United States for requisitioning of his steam tug, the *MacArthur*, in October 1942 (R. 1–4). The pertinent facts, as found by the Court of Claims, are as follows:

The *MacArthur*, formerly the *Guthrie*, was built at Baltimore in 1895 for the Coast Guard. It was a small harbor boat used by the Coast Guard in Baltimore harbor, from 1895 to 1939, as a boarding tender or tug to transport immigration, customs, and health officers from the shore to vessels arriving in the harbor (R. 5–6). In the latter part of 1939, the *Guthrie* was transferred from Baltimore to the Coast Guard base at Portland, Maine (R. 7).

In September 1941, a special Board of Survey, appointed by the Coast Guard to ascertain the vessel's condition and to make recommendations regarding her disposition or repair, reported that, under normal conditions and considering the vessel's age, the expense of putting her in operating condition would not be justifiable and the vessel should be placed out of commission, but that, in view of the emergency and the great need for vessels, certain designated repairs should be made so that three or four more years of satisfactory service could be had from the vessel (R. 7–8). However, Coast Guard Headquarters directed that the *Guthrie* be sold to the highest bidder in accordance with regulations (R. 8). The sale was advertised and conducted as an open-market transaction, and sealed bids were requested, but only three were received. Respondent was the highest bidder and, on March 19, 1942, the vessel was sold to him in Maine for the sum of $2,875 (R. 8).

During the period from March 19, 1942 to April 26, 1942, respondent caused certain repairs and improvements to be made to the vessel and purchased additional equipment. He expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had not respondent, who was experienced in performing and supervising such work and tried to keep the costs as low as possible, performed part of the work himself, with the aid of a crew of four. The remainder of the work was performed by a shipyard at Portland (R. 8–9). On April 20, 1942, respondent received, from the Bureau of Marine Inspection and Navigation of the Department of Commerce, a Certificate of Inspection which had been withheld pending completion of repairs on the boiler (R. 8). This certificate designated the vessel as a "towing steam vessel" and permitted it "to navigate for one year, the waters of bays, sounds, rivers and harbors" (R. 8). On April 21, 1942, the Department of Commerce issued a Consolidated Certificate of Enrollment and License authorizing respondent to employ the vessel in the coasting trade for one year (R. 9).

On completion of the repairs and improvements, the *Guthrie* was brought to New York under her own power, and after a few days at an East River pier, was moored at Staten Island, where she remained until taken by the United States. She did not engage in any towing operations or com-

mercial work at any time while in respondent's possession. The vessel's name was changed to *MacArthur* in New York (R. 9).

Late in September, 1942, a naval officer surveyed the *MacArthur* to determine her suitabilty for use on the Navy's Eastern Sea Frontier as a steam-heating plant for heating and pumping fuel oil from oil barges into naval combat vessels. This survey termed the vessel's condition, on the whole, to be "fair to good," estimated her original cost at $45,000 and replacement cost at $56.000, and appraised her present value at $9,000[1] (R. 9–10). On October 15, 1942, the War Shipping Administration requisitioned the vessel pursuant to Section 902 of the Merchant Marine Act of 1936, as amended, and took from respondent the entire ownership, possession, and use of the vessel, her equipment and spare parts (R. 5.)[2] After her requisitioning, the vessel was used by the Navy at the docks of the Eastern Sea Frontier for furnishing steam to heat oil for use in combat vessels (R. 10).

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[1] This appraisal was based on the opinion that the vessel had six years left of useful life, that her value should be depreciated during the remaining useful life at 3.3 per cent per year, and that she was accordingly now worth 19.8 per cent of her estimated cost, or about $9,000; market value was not taken into account in this appraisal (R. 10).

[2] Executive Order 9054, February 7, 1942 ("Establishing a War Shipping Administration in the Executive Office of the President and Defining Its Functions and Duties") (7 Fed. Reg. 837, 3 CFR, Cum. Supp. (1943) pp. 1086–1088) transferred certain powers and functions of the Maritime Com-

The War Shipping Administration determined the amount of $9,000 to be just compensation for the *MacArthur*, and on May 18, 1946, offered that sum to respondent (R. 5). In making this determination, the Administration was guided by the 1941 Coast Guard survey rendered before sale of the vessel to respondent (*supra*, p. 3), by the September 1942 naval survey immediately prior to the requisitioning (*supra*, p. 5), and by the rules established by the Advisory Board on Just Compensation (R. 11).[3] Respondent accepted 75% of the Administration's award ($6,750), and brought this suit under Section 902 of the Act to recover the balance of $20,000, alleged to be the amount respondent was entitled to receive as just compensation, plus interest (R. 4, 5).

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mission under the Merchant Marine Act, including those pertaining to requisition, to the War Shipping Administration. Section 202 of the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 Stat. 481, 501, retransferred these powers to the Maritime Commission as of August 30, 1946.

[3] Executive Order 9387, October 15, 1943 ("Establishing An Advisory Board on Just Compensation and Prescribing Its Functions") (8 Fed. Reg. 14105, 3 CFR 1943 Supp., ch. II, pp. 48–49) established an Advisory Board on Just Compensation, consisting of Judges Learned Hand, John J. Parker, and Joseph C. Hutcheson, Jr., to aid in the determination of just compensation to be paid by the War Shipping Administration for requisitioned vessels. The Order provided in part:

"4. The Board, in accordance with the applicable provisions of the Constitution and the laws of the United States, shall establish fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be

The Court of Claims found that the "fair market value of the *MacArthur* at the time and place of the taking was $15,500.00" (R. 12). There then existed in and about the Port of New York "a rising market and a strong demand for tugs of all types, including the *MacArthur*," but most tug owners were reluctant to sell be-

paid for all vessels requisitioned, purchased, chartered or insured by the Administration. The Board may prescribe such rules, regulations and procedures as it deems necessary or advisable in carrying out its functions.

"5. In determining the amount of just compensation, which should be paid for each vessel, the War Shipping Administration will be guided by the general standards, rules and formulae established by the Board."

The Board heard arguments and received briefs, and on December 7, 1943, submitted to the Administrator of the War Shipping Administration its report, containing the rules for the determination of just compensation which are set forth in Appendix B, *infra*, pp. 136–141.

Executive Order 9611, September 10, 1945 ("Reestablishing the Advisory Board on Just Compensation"), 10 Fed. Reg. 11637 (as amended by Executive Order 9627, September 24, 1945, 10 Fed. Reg. 12113) reconstituted the Advisory Board (consisting of Judges Joseph C. Hutcheson, Jr., and Charles E. Clark, and Justice Irwin Untermeyer) "for the limited purpose of establishing fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned pursuant to the act of June 6, 1941, 55 Stat. 242" [authorizing the requisitioning of foreign merchant vessels "lying idle in waters within the jurisdiction of the United States"].

On October 26, 1945, the reestablished Board, after hearing argument, submitted to the Administrator its report and supplementary rules pertaining to the requisitioning of foreign vessels, set forth in Appendix C, *infra*, pp. 142–149.

cause of the greatly increased business. From August, 1941 to February, 1945, six tugboats were sold on the open market in that area, but none of these sales involved a vessel closely comparable to the *MacArthur* in design, power, and equipment (R. 11–12). The Court of Claims also found (R. 12–13):

> Beginning on September 8, 1939, the date on which the President proclaimed the existence of a limited national emergency, and continuing up to the date that plaintiff's vessel was requisitioned, there was a general rise in the market values of nearly all vessels in and about the Port of New York. This increase in values between September 8, 1939 and May 27, 1941, the date on which the President proclaimed the existence of a general national emergency, was due to the demand for vessels which followed the outbreak of war in Europe. After May 27, 1941 and particularly after December 7, 1941, the date of the Japanese attack on Pearl Harbor, the rise in market values was due to the Government's need for vessels, which necessitated the taking of many vessels, and to the great increase in shipping and in harbor traffic which occurred during the period of the war. These conditions combined to create a demand for and a shortage of tugs. As a result, the market value of the *MacArthur* had been enhanced by the sum of $5,000.00 by October 15, 1942.

> Prior to the time the defendant requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect

Judgment was granted for the sum of $15,500, plus interest, less the amount already paid by the United States (R. 13, 18).

The Court of Claims stated, in its opinion, that it was not possible to allocate the $5,000 of "enhanced value" between, first, "the great increase in shipping and harbor traffic due to the war," and, secondly, "the government's need for vessels in the prosecution of the war, which necessitated the requisitioning of many of them"; but it also stated that even if it were possible to make such an allocation, the United States would not be entitled to a deduction from market value on account of enhancement attributable to its need for vessels in the prosecution of the war (R. 14). The court held that just compensation requires the Government to pay the property owner the price he could have secured from someone else, and that respondent could have obtained $15,500 from other willing purchasers.[1] The "enhancement value" clause of Section 902 (a)—the clause which provides that "in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or

[1] The United States did not, and does not now, contest the finding that on October 15, 1942, respondent could have sold the vessel to other potential purchasers for $15,500.

use"—was held not to be binding on the courts but only on the administrative agency, since the determination of just compensation was said to be solely a judicial function, and that it must be presumed that the Merchant Marine Act was passed with that principle in mind (R. 14, 16, 17).

Since the Court of Claims' opinion indicated that it might have rested on a concession by government counsel that the "enhancement value" clause of Section 902 (a) was not binding, or intended to be binding, on the courts (R. 17), the United States filed a motion for a new trial, in which it was pointed out that it was the Government's position that (a) the "enhancement value" clause of Section 902 (a), properly construed, was binding on the courts, including the Court of Claims, in determining just compensation, and (b) the statute, so construed, was valid and constitutional. This motion for a new trial was denied, without opinion, on April 5, 1948 (R. 18).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that the "enhancement" clause of Section 902 (a) of the Merchant Marine Act, 1936, as amended, does not undertake to bind the courts when they are called upon to fix just compensation for vessels requisitioned under that Act, and in failing to hold that the court was

required to determine such just compensation in accordance with the terms of the "enhancement" clause.

2. In failing to hold that the "enhancement" clause of Section 902 (a) of the Merchant Marine Act, 1936, as amended (construed so as to be applicable to judicial determinations of just compensation under that Act) is constitutional and valid.

3. In holding that respondent should recover, on account of the taking of his vessel, the full market value of the vessel as of the time and place of taking, regardless of the amount by which that market value was enhanced by the causes necessitating the taking.

4. In failing to find the sum by which the vessel's market value at the time and place of taking (as found by the court) was enhanced by the Government's need for vessels in the prosecution of the war which necessitated the requisitioning of many of them, and in failing to reduce the amount awarded to respondent by the enhanced sum.

5. In entering judgment for respondent in the amount in which it was entered.

SUMMARY OF ARGUMENT

Section 902 of the Merchant Marine Act, 1936 (as amended in 1939), requires that on requisition of the title or use of an unsubsidized merchant vessel, in times of national emergency or

to promote the national defense, "the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." Our argument is that the latter provision—the "enhancement" clause—is applicable to judicial determinations of just compensation, and not merely to the initial administrative calculation; that it operates to base awards for requisitioned ships on more normal values rather than on war-inflated prices; and that, so applied, it violates no constitutional right or privilege.

I

The "enhancement" clause applies to judicial determinations of just compensation. Section 902 (a) states the limitation in general terms, as a partial definition of just compensation, and without any indication that it is to govern only the administrative proceedings; and Section 902 (d), providing for a judicial determination where the owner rejects the Commission's award, does not purport to alter or exclude the general definition of just compensation contained in subsection (a). In the face of this plain text, it is difficult to conceive that Congress limited the "enhancement" restriction to the administrators, thus largely nullifying its prime purpose to preclude payment of excess wartime values and, at

the same time, discriminating against those shipowners unable or unwilling to go to court. Moreover, the clause's long legislative history shows a dominating Congressional purpose to avoid the payment of the high prices which had been awarded, under the accepted judicial doctrines of eminent domain, for tonnage requisitioned in World War I. And it is especially significant that the clause was taken over bodily, in 1936, from the 1928 Merchant Marine Act and previous requisition proposals (concerning subsidized vessels) in which the "enhancement" restriction was admittedly not limited to the administrative proceeding. In 1939, the statute was amended to substitute "just compensation" for the term "fair actual value," previously used, but the "enhancement" clause was expressly retained, and it was assumed on all sides to govern court proceedings, although there were doubts as to its validity in that connection. Congress even strengthened the status of the clause by specifically characterizing, in Section 902 (d), the measure of compensation to be paid, including the "enhancement" clause, as the "just compensation authorized by this section." Congressional activity in the field of ship requisitions, since 1939, seems to us also to confirm the reading that the restriction in the 1936 and 1939 statutes was designed to be applied by the courts as well as by the administrators.

Both in Congress and outside, there have been doubts—based on previous statements by this Court—as to the validity of extending the "enhancement" clause to judicial just compensation determinations, but the step was taken nevertheless. In these circumstances, we suggest that it would frustrate the whole legislative purpose to construe the clause as inapplicable here solely to avoid an issue of validity.

II

A. The validity of the "enhancement" clause, construed to govern court determinations, is supported by a proper interpretation of the Fifth Amendment, taken together with Congressional authority under the war power. In our view, Congress has power, within reasonable limits, to define the measure of just compensation. There is nothing in the Fifth Amendment suggesting that the federal courts alone are to develop the measures and methods of ascertaining "just compensation"; and since general ideas of justice, equity, and fairness necessarily inhere in the constitutional conception, we believe that the Amendment does not wholly foreclose Congress, the primary policy-making organ of the Federal Government, from implementing its own views of adequacy and justice. The Court has accorded great, if not conclusive, weight to legislative or administrative applications of comparable Constitutional provisions of equally general scope and

similar purpose, and which likewise call for the balancing of interacting policies, and the evaluation of past experience:—"due process of law," "equal protection of the laws," "general welfare," impairment of contracts. In the eminent domain clause itself, the requirement of a "public purpose" for a taking has been similarly treated. And the High Court of Australia, construing the comparable clause of the Commonwealth Constitution empowering Parliament to make laws for "the acquisition of property on just terms," has held that it is for the legislature, within the limits of reason, to fix the acquisition terms it judges to be just.

It is true that in *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, 327 (1893), the Court appeared to deny the power of Congress to lay down any rules of just compensation. But that statement, which came at the beginning of the Court's serious consideration of "just compensation" and presumably reflected the then prevailing concern with judicial limitations on legislative authority, did not rest on any theretofore generally accepted principle, nor has it ever been repeated by the Court except in general dictum. We think that this *Monongahela* principle is incorrect and inconsistent with governing constitutional principles, and (like the other branch of that case) it should be reexamined and discarded or qualified.

B. The "enhancement" clause is well within the limits of Congress' power to establish legislative measures of just compensation. The general standard for testing such measures will be found, in our view, in the criteria the Court has used to determine whether state condemnations have violated the property owner's right to just compensation, *i. e.*, whether there has been an "absolute disregard" or "reckless disregard" of the owner's rights, whether he has been prevented "from obtaining substantially any compensation," whether there has been a "gross and obvious" error "coming close to the boundary of arbitrary action." Within these bounds, Congress may decide what is the proper measure of just compensation in particular situations. The Fifth Amendment protects the fundamental right to be free of confiscation, but it does not prescribe any specific measure, amount, or rule, where Congress wills otherwise. This standard for judicial review does not conflict with the just compensation rules elaborated by this Court, for Congress has habitually referred the entire problem of just compensation to the judiciary, and the Court has not had occasion—with the single exception of the *Monongahela* case—to pass upon legislative measures of just compensation. A narrow standard of review, similar to that we suggest, has recently been established by the High Court of Australia for compulsory acquisition legislation under the "just terms" clause of the Australian Constitution.

Whatever event or date be reasonably taken as marking the beginning of the excluded increase in ship-values, the "enhancement" clause cannot be questioned under these general criteria for reviewing legislative measures of just compensation. In the direct light of governmental experience with the purchase and requisition of ships in World War I, Congress has determined that equity and fairness require a shipowner to accept, in times of war or of a national-defense emergency, less than his ship's war inflated market value, so that he may receive fair compensation at normal price levels while the Government can acquire urgently needed vessels for reasonable sums. In a sense, Congress has thus given its interpretation of the traditional eminent domain concept of "*fair* market value," in the same way as the courts have, not infrequently, departed from the standard of current market value because of demands of equity or fairness. From another viewpoint, what Congress did was to elaborate and extend the judicial just compensation rule that the owner is not entitled to the increment due to the initiation of the general project, if his property was probably (but not necessarily) within the scope of the project from the beginning. Cf. *United States* v. *Miller*, 317 U. S. 369, 377. The intrinsic fairness of the Merchant Marine Act's "enhancement" clause is also strongly attested by the comparable measures—excluding value-increases due to the war or the emergency—adopted in World War II by England, Canada, Australia, New Zealand, and

France—each a democratic nation which has long followed the principle of awarding just compensation for requisitioned property.

Constitutional grounding for the "enhancement" clause is found not only in the Fifth Amendment and the general federal eminent domain power, but also in the war power, which vests Congress with the right to protect the nation against war profiteering and authorizes extraordinary controls over life, liberty, and property. The 1942 Congress adopted the Renegotiation Act in order to eliminate contractors' excessive war profits, which would otherwise have been made; the 1936 and 1939 Congresses used the "enhancement" clause to limit excessive prices which would otherwise have to be paid for requisitioned vessels. The war power which sustained the Renegotiation Act (*Lichter* v. *United States*, 334 U. S. 742) should be equally effective in support of this other method of controlling profiteering and limiting war costs.

III

Three major interpretations of the type and measure of the enhanced value excluded by the "enhancement" clause have been advanced. The Comptroller General has ruled that the clause prohibits the payment of compensation to the extent that it may be based upon values in excess of those existing on September 8, 1939 (the date of the President's proclamation of a limited na-

tional emergency), provided that such excess be due to economic conditions directly caused by the national emergency. The Advisory Board on Just Compensation, appointed by the President, defined the excluded enhancement as that "due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable * * *." A third construction, urged by respondent and by many shipowners, is that the clause merely incorporates the conventional just compensation rules, especially the principle that any special value to the taker should not be considered. This third construction may be set aside as plainly contrary to the avowed Congressional purpose to limit awards to levels substantially less than those allowed by the courts after World War II, and as out of harmony with the statute's wording and history. The legislative record is less clear as to the starting point from which Congress intended to exclude enhancement, but we believe, on review of the history, that Congress desired to exclude at least a substantial part of the enhancement accruing during a definite period of tension prior to the actual engagement of the country in war or prior to the proclamation of a full-scale national emergency (which occurred, in World War II, on May 27, 1941).

There is strong support for the Comptroller General's view of excluded enhancement in the

statute's legislative history and in the effect this interpretation will have to fulfill the purpose of Congress. We believe that the Advisory Board's interpretation, which emphasizes the Government's actual need for shipping and which may not differ in result from the Comptroller General's view, should be adopted if the other view is rejected.

IV

In the instant case, the Court of Claims has found $5,000 of enhancement from September 8, 1939 to the date of taking (October 15, 1942) (R. 12–13). On the Comptroller General's view, all of this increase would be deductible. On the Advisory Board's view, certainly a large share would be excluded, and it may well be that, on a proper interpretation of enhancement due "the Government's need for vessels," the entire $5,000 would be excluded, especially since it seems likely from the findings that the increment mainly accrued during the seven months (March–October 1942) respondent held the vessel.

ARGUMENT

The "enhancement" clause of Section 902 (a) of the Merchant Marine Act symbolizes an important Congressional effort, in advance of an actual conflict, to control excessive war profits and to assure the nation in wartime of adequate shipping facilities at fair prices. This effort the

Court of Claims has largely devitalized by its holding that the clause "was not intended to lay down a rule binding on the courts," and its suggestion that the statute would be unconstitutional if it were to be applied in a judicial proceeding to fix just compensation (R. 14, 17). In our view, this decision constitutes a serious misinterpretation of the Merchant Marine Act and a misapplication of the Fifth Amendment's requirement that "just compensation" be paid for a taking of private property for public use. In the field of shipping, the "enhancement" clause has widespread significance since it governs awards both for the taking of a vessel's title and for the requisition of its use (Section 902 (a), (c), *infra*, pp. 132, 133–4),[5] as well as insurance amounts payable by the Government on ships requisitioned for use which are lost or damaged due to a Government-assumed risk and where the parties have not agreed to a valuation of the vessel or other mode of compensation (Section 902 (c), *infra*, pp. 133–4).[6] The decision below totally undercuts

[5] Appendix D contains a listing of the pending cases for awards for requisitions of the title or use of vessels.

[6] Appendix D includes (under "requisitions for title") the pending cases involving insurance claims, on ships requisitioned for use, where the parties did not agree on the vessel's valuation or other mode of compensation, and the ship was then lost. Rule 7 of the Rules of the first Advisory Board on Just Compensation has settled, so far as administrative awards are concerned, the application of the enhancement clause to such insurance claims. *Infra*, p. 140.

the Congressional plan to achieve non-excessive prices for needed war supplies in the single field of merchant vessels. But the constitutional implications of the Court of Claims' decision have even broader significance, casting serious doubt, as they do, on the general power of Congress to define the proper measure of "just compensation" for war requisitioned property so as to exclude inflation of values stemming from the Government's large and pressing needs for supplies and equipment. We believe that power—exercised within reasonable limits—should be sustained.

I

THE "ENHANCEMENT" CLAUSE OF SECTION 902 OF THE MERCHANT MARINE ACT, 1936, APPLIES TO JUDICIAL DETERMINATIONS OF JUST COMPENSATION UNDER THAT SECTION

A. *Text:* The text and legislative history of Section 902 demonstrate that the "enhancement" clause was designed to apply to judicial determinations of just compensation, as well as to the initial administrative award.[7] Section 902 (a)

[7] This issue arises, of course, only if the "enhancement" clause does more than embody the traditional judicially-developed doctrines of just compensation. If the clause adds nothing to the accepted conception of "just compensation," it is wholly unimportant whether it was directed only to the administrators or to the courts as well. However, we show below (point III, *infra*, p. 90) that the clause was designed by Congress to impose limitations not found in the accepted judicial measures of just compensation.

states the limitation in general words, as a partial definition of just compensation, and without any indication that it is to govern only the administrative proceedings.[8] Subsection (d) provides "in all cases" for initial determination and payment of the "just compensation authorized by this section" by the Maritime Commission, and then entitles a dissatisfied owner to accept 75% of the administrative award and to bring suit for "such further sum as, added to said 75 per centum will make up such amount as will be just compensation therefor * * *." The latter language, pertaining to the courts, does not purport to alter or exclude the definition of just compensation contained in subsection (a), and it is clear, from the text of the two paragraphs alone, that the measure of compensation was to be the same for the courts as for the Commission. There is no ground for asserting, as some have done, that Congress intended to limit the Commission's awards to something less than just compensation, leaving it for the courts to apply the full constitutional measure; in specific terms, Congress

[8] "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use."

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designated the administrative awards as determinations of *just compensation*,[9] and a statute could not more plainly indicate the legislative finding that the standards established for the Commission's action embodied just compensation.

Moreover, it is inconceivable that a Congress, intent on precluding payment of excess wartime values (as both text and legislative history show), would have nullified its purpose by directing the "enhancement" restriction solely to the administrators. If that were the statutory design, owners of ships of substantially enhanced value would automatically refuse Commission awards and resort to the courts to procure the additional compensation denied them administratively under the statute. The entire process of administrative determination, expressly required by the Act, would become a meaningless and wasteful effort and the "enhancement" clause a futile gesture.

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[9] Section 902 (d) provides first that "*the just compensation authorized by this section* shall be determined and paid by the Commission as soon as practicable," and then goes on to say that "if the *amount of just compensation determined by the Commission* is unsatisfactory to the person entitled thereto," suit shall be brought in the Court of Claims or the ~~action with such use.~~" (Italics added.)

Section 902 (c), dealing with requisitions for use, provides that, in the absence of agreement on a charter, "the Commission shall pay to such person *on account of just compensation* a sum equal to 75 per centum of such rate of hire * * * and such person shall to be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use." (Italics added.)

On this interpretation, probably the only shipowners to accept the Commission award would be those forced to acquiesce because of their lack of sufficient resources to engage in the necessary litigation; the bringing about of such an inevitably discriminatory effect can hardly be thought to be the Congress' purpose in adopting the "enhancement" clause.

B. *Legislative history:* 1. The legislative history of the "enhancement" clause confirms our reading that the courts were intended to apply the same measure as the Commission.[10] The earliest seed of the "enhancement" limitation seems to have been Section 10 of the Shipping Act of 1916 (Act of September 7, 1916, 39 Stat. 728, 731) which empowered the President to requisition "any vessel purchased, leased, or chartered" from the newly-created United States Shipping Board, and provided for payment of "the fair actual value *based upon normal conditions* at the time of taking * * *"; in case of dispute a board of arbitration was to determine the value (italics added).[11] The italicized phrase was added to the measure at the behest of the Senate Committee of Commerce and adopted by both houses without discussion (H. Rept. 659, 64th Cong., 1st sess., p. 8; S. Rept. No. 689, 64th

[10] At pp. 92–105, *infra*, we further discuss the clause's history, with a view to discovering the measure and content of the excluded enhancement.

[11] This provision was repealed by Section 903 (a) of the Merchant Marine Act, 1936, 49 Stat. 1985, 2016.

Cong., 1st sess., pp. 1, 4; 53 Cong. Rec. 12812–3, 13365–8), but it is not unfair to infer that the rapid upward spiralling of ship prices, which was quite evident by the summer of 1916, prompted the amendment.[12] However, the general ship-requisitioning statutes of World War I, applying to non-Shipping Board vessels, did not carry like provisions (Act of June 15, 1917, 40 Stat. 182, 183; Act of July 1, 1918, 40 Stat. 704, 720; Act of July 18, 1918, 40 Stat. 913, 915; Act of November 4, 1918, 40 Stat. 1020, 1022), and determinations of just compensation for most vessels taken in that war were made under these general statutes. See *infra*, pp. 93–5.

After the war, in 1922, various merchant marine bills were introduced into the 67th Congress (H. R. 10644, H. R. 12021, H. R. 12817), which contained an "enhancement" clause with substantially the present wording ("in neither case shall such fair actual value be enhanced by the causes necessitating the taking"); each of these bills limited the requisitioning powers to vessels which had been owned or financially aided by the Federal Government, and like the 1916 Shipping Act provided for arbitration in case of dispute.

[12] Smith, *Influence of the Great War Upon Shipping* (1919) (No. 9 of the Preliminary Economic Studies of the War of the Carnegie Endowment for International Peace), pp. 31–3, briefly summarizes the steep rise in ship rises in the first years of World War I. See also S. Rept. No. 841, 63rd Cong., 3d sess., pp. 7–8, and H. Rept. No. 1149, 63rd Cong., 3d sess. (on previous Shipping Board bills).

All proposals failed of enactment, but proponents of the "enhancement" clause clearly viewed it as cutting down war-inflated values comparable to those paid in World War I. H. Rept. No. 1112, 67th Cong., 2d sess., pp. 18, 29; S. Rept. No. 935, 67th Cong., 4th sess., pp. 24, 35; 63 Cong. Rec. 97, 367–8. In the 68th Congress, the House of Representatives appointed a Select Committee of Inquiry into Operations, Policies, and Affairs of the United States Shipping Board Merchant Fleet Corporation, which held extensive hearings. This Select Committee, which made its report to the 69th Congress, referred to the "fabulous" prices paid for vessels in World War I, and recommended amendment of Section 10 of the Shipping Act of 1916, *supra*, "so as to clearly and specifically provide that in the event of a future national emergency and the need for such [Shipping Board] ships for national defense, the Government could take them over on the basis of charter rates prevailing before the emergency arose, or at the world market value of such ships before the emergency arose." H. Rept. No. 2, 69th Cong., 1st sess., pp. 31–2, 35. The next significant legislative action was the enactment by the 70th Congress of the Merchant Marine Act, 1928, 45 Stat. 689, Section 702 of which (45 Stat. 697) authorized the requisitioning of government-aided vessels for national defense purposes or during a Presidentially-proclaimed national emergency, and provided for the payment of the "fair

actual value of the vessel at the time of taking," with the proviso that such fair actual value should not be "enhanced by the causes necessitating the taking"; a shipowner dissatisfied with the administrative award could sue the United States under the Tucker Act "for the amount of such fair compensation." 45 Stat. 698. The few pertinent materials again indicate the clear purpose to eliminate "any enhancement because of the emergency" and not to pay high war-time prices. H. Rept. No. 1649, 70th Cong., 1st sess., 9–10 (conference report); 69 Cong. Rec. 7916–17 (Cong. Davis), 7918.

In 1935 and 1936, several merchant marine bills were introduced into the 74th Congress (*e. g.* H. R. 7521, H. R. 7981, S. 2582, S. 3376, S. 3500, S. 4110, S. 4332, H. R. 8555), of which H. R. 8555 was the only one to reach debate, and it became the Merchant Marine Act, 1936, 49 Stat. 1985. As it was reported to the House of Representatives, H. R. 8555 followed the Merchant Marine Act, 1928, in authorizing the requisitioning only of government-aided vessels, and, in that connection, contained an "enhancement" clause in the same terms as the 1928 Act. H. Rept. No. 1277, 74th Cong., 1st sess., pp. 26, 33. As passed by the House, the requisitioning provisions of the bill were still limited to government-aided vessels, but it was also provided that in any case no more than the ship's cost less depreciation could be paid upon a taking. 79 Cong. Rec. 10200. As initially

reported to the Senate, H. R. 8555 apparently contained similar provisions. S. Rept. No. 1226, 74th Cong., 1st sess. After being reported, the bill was amended in the Senate to permit the requisitioning of American documented vessels which had not been federally aided, and the "enhancement" clause, in the terms in which it had been previously used, was made applicable to takings of such vessels. 80 Cong. Rec. 9885, 9920–1, 10077.[13] A stricter provision, derived from the cost maximum inserted in the bill on the House floor, was made for payment upon the requisitioning of vessels for which a construction differential subsidy had been allowed (*i. e.* government-aided vessels). 80 Cong. Rec. 10077. The bill became law in this form, with no further discussion of the requisition provisions. Sections 802, 902 (a), 902 (b), 49 Stat. 2011, 2016, *infra*, pp. 129–131.

Thus, as it was passed in 1936, Section 902 (a) applied to unsubsidized vessels (such as respondent's) the same enhancement clause which had

[13] After H. R. 8555 was reported to the Senate, Senators Copeland, Gibson, and Guffey, who had all introduced other merchant marine bills into the Senate, joined in proposing an amendment to H. R. 8555 (known as the Committee print of June 13, 1936) which was substituted for the version of H. R. 8555 previously reported to the Senate, and was the measure actually considered by the Senate. 80 Cong. Rec. 9885. This June 13, 1936, committee print provided for the requisitioning of unsubsidized vessels.

Senator Copeland's original proposals limited the requisitioning power to subsidized vessels; Senator Guffey's bill extended it to all vessels; each bill contained an enhancement clause governing all takings.

been proposed in 1922, and adopted in the 1928 Merchant Marine Act, with respect to government-aided ships. And, as in 1928, the new statute applied the critical clause both to the administrative award and to the later judicial hearing. Payment of the "*fair actual value*" of requisitioned vessels which had not been subsidized was required, "and in no case shall such fair actual value be enhanced by the causes necessitating the taking" (section 902 (a)); the Commission was to "ascertain the *fair* compensation for such taking or use," and a dissatisfied claimant could sue the United States "for the amount of such *just* compensation." Section 902 (b). [Italics added.] 49 Stat. 1985, 2015–6, *infra*, pp. 130–1. *Mutatis mutandis*, this was the same as the comparable section of the preceding statute, in which the "enhancement" clause was clearly not limited to the administrative proceeding.[14] The sparse

[14] Section 702 of the Merchant Marine Act, 1928, 45 Stat. 689, 697–8, provided:

(a) The following vessels may be taken and purchased or used by the United States for national defense or during any national emergency declared by proclamation of the President:

(1) Any vessel in respect of which, under a contract hereafter entered into, a loan is made from the construction loan fund created by section 11 of the Merchant Marine Act, 1920, as amended—at any time until the principal and interest of the loan has been paid; and

(2) Any vessel in respect of which an ocean mail contract is made under Title IV of this Act—at any time during the period for which the contract is made.

(b) In such event the owner shall be paid the fair actual

legislative history relevant to the extension of the clause, in 1936, to unsubsidized vessels does not indicate that the provision, despite the statutory text, was to be read as inapplicable to judicial proceedings. 80 Cong. Rec. 9885, 9920–1, 10077.[15] On the other hand, the plainly evidenced Con-

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value of the vessel at the time of taking, or paid the fair compensation for her use based upon such fair actual value; but in neither case shall such fair actual value be enhanced by the causes necessitating the taking. In the case of a vessel taken and used, but not purchased, the vessel shall be restored to the owner in a condition at least as good as when taken, less reasonable wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the vessel in such condition. The owner shall not be paid for any consequential damages arising from such taking and purchase or use.

(c) The President shall ascertain the fair compensation for such taking and purchase or use and shall certify to Congress the amount so found by him to be due, for appropriation and payment to the person entitled thereto. If the amount found by the President to be due is unsatisfactory to the person entitled thereto, such person shall be entitled to sue the United States for the amount of such fair compensation and such suit shall be brought in the manner provided by paragraph 20 of section 24 or by section 145 of the Judicial Code, as amended [U. S. C., Title 28, §§41, 250].

[15] Some have read Senator Bone's ambiguous statement at 80 Cong. Rec. 9920–1 as indicating his belief that Section 902 (b) of the 1936 Act permitted a court to disregard the "enhancement" clause, but we believe, rather, that Senator Bone, as well as Senator Clark (who also participated in this phase of the debate) was directing his attack against allowing *de novo* judicial determination of awards for the taking of *subsidized* vessels, and in that connection thought that Section 902 (b), as it then stood (*i. e.* without the initial "except" clause, *infra*, p. 130), opened the door to judicial allowances greater than the depreciated cost of the subsidized vessel.

gressional purpose to use the clause to avoid the payment of the high prices for requisitioned tonnage which had been paid in World War I, compels the conclusion that the courts were included within the scope of the clause. And the semicircular argument that Congress "must have known" of its impotence to establish legislative rules of just compensation binding on the courts, and therefore could not have intended to make the "enhancement" clause applicable in judicial proceedings, is largely answered by the 1936 Act's close following, in this connection, of the 1928 statute, which admittedly raised no such constitutional issue since it dealt solely with subsidized vessels as to which the accepted judicial measures of just compensation would not have to be applied. Doubts as to the validity of making the same provision for unsubsidized ships may have existed, but Congress took the step nevertheless.[16]

[16] Title IV ("Ocean-Mail Contracts) of the Merchant Marine Act, 1936, 49 Stat. 1993-1995, terminated the ocean-mail contracts authorized by the 1928 Act, provided for Commission settlement by agreement (on specific conditions) of claims for such termination, and as an exclusive judicial remedy opened the Court of Claims to suits by contractors who did not settle with the Commission. The court's jurisdiction was "expressly limited to an award of just compensation under the provisions heretofore set forth and such just compensation shall not include any allowances for prospective profits or for speculative future profits that might have been realized by the claimant if permitted further to carry out the contract." In this connection, it is significant that the sponsor of the ocean-mail provisions supported the limitation on the Court of Claims' jurisdiction, although, as he said,

2. In 1939, some question had arisen as to the statute's validity under the Fifth Amendment, because of its use of "fair actual value" in lieu of "just compensation," and the section was amended to read as it now does. 53 Stat. 1255–1256, *infra*, pp. 132–4.[17] But it was expressly pointed out, both to the House of Representatives and to the Senate, that the "changes also retain the injunction now carried in section 902 that the value of the property taken and used shall not be enhanced by the causes necessitating the taking and use." H. Rept. No. 660, 76th Cong., 1st sess., p. 4; S. Rept. No. 678, 76th Cong., 1st sess., p. 4; 84 Cong. Rec. 6105, 10626; Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st sess., on H. R. 4983, April 27, 1939, p. 10. And there is no indication in the debates or reports that the "enhancement" clause was henceforth to be restricted to the administrative award; it was assumed by representatives of the Commission and of the shipowners that the clause governed court proceedings.[18] Indeed, these 1939 amend-

"There is some question as to the right of the Congress in connection with fixing a rule as to recoverable damages when a case gets into court." 80 Cong. Rec. 10070.

[17] By the same amendment, Section 902 was broadened to apply to all vessels owned by citizens of the United States, and not merely those ships documented under the laws of the United States.

[18] These 1939 changes were suggested by the Maritime Commission, which took the position that retention of the terms "fair actual value" might lead to a holding that the

ments to section 902 would have been entirely superfluous if Congress had not intended *all* the just compensations provisions of that section, including the "enhancement" clause, to apply to the courts, since no constitutional issue could possibly arise as to measures of compensation controlling only the Commission, so long as the claimant was free to bring suit to increase an unsatisfactory award. The most that can be said is that there may have been some doubt that the clause could validly apply in judicial determinations of just compensation, but there was no deviation from a clear purpose to continue the provision's application to such proceedings, if

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constitutional measure of just compensation had been denied. At the committee hearings, the Chairman of the Commission (Admiral Land) pointed out that the "enhancement" clause was retained, and added:

"It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts."

(Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st sess., on H. R. 4983, April 27, 1939, p. 10).

At the same hearings, Mr. John J. Burns, representing the American Merchant Marine Institute, which favored deletion or amendment of the clause, said:

"And I would just like to call attention to the fact Admiral Land stated, in his prepared statement, there *may* be some question whether that limitation, to wit—that in awarding just compensation, the *court* shall not take into account the cause of the taking—raises some constitutional question as to whether the limitation is binding on the court."

(Hearings, *supra*, p. 15.) [Italics added.]

the Constitution permitted. Congress even strengthened the status of the clause by expressly characterizing the measure of compensation to be awarded, including the "enhancement" limitation, as "the just compensation authorized by this section." Section 902 (d), *infra*, p. 134.[19]

[19] It has been suggested (notably by former Attorney-General William D. Mitchell, who advised the War Shipping Administration on the "enhancement" clause in 1943) that the omission, in 1939, of the word "such" before "just compensation" in the portion of section 902 (d) dealing with judicial proceedings (*infra*, p. 134), when contrasted with the term "such just compensation," in the comparable portion of section 902 (b) of the 1936 Act (*infra*, p. 130), indicates an intention to free the courts from all concern with the "enhancement" clause. But we hardly believe that this slight change can carry with it, all unnoticed, a fundamental alteration of this magnitude in meaning and application, especially in the light of the reiterated emphasis by Commission and legislators on the continued inclusion of the "enhancement" clause. See *supra*, p. 33 and fn. 18. The change is much more easily explained, if that be necessary at all, by the substitution in the first portion of subsection (d) of "the just compensation authorized by this section" and "the amount of just compensation determined by the Commission" (*infra*, p. 134) for the 1936 phrase "fair compensation" (*infra*, p. 130). If "such" had not been deleted in the latter portion of the paragraph, it might have been taken to refer back to the unsatisfactory (to the shipowner) "amount of just compensation [actually] determined by the Commission." Moreover, the 1936 Act may have needed "*such* just compensation" in order to assure the application of the "enhancement" clause to judicial proceedings, since section 902 (b) (as it then stood) made the clause applicable to administrative proceedings by the unconventional term "*fair* compensation", which might very well differ markedly from "*just* compensation"; in contrast, the 1939 statute (section 902 (d)) incorporates the "enhancement" clause in the opening phrase, "the just compensation

3. Opposing inferences as to Congressional interpretation of the "enhancement" clause's judicial application have been drawn from the action and inaction of Congress in this field, subsequent to the 1939 amendment to the Merchant Marine Act. To the extent that these later legislative materials have any real pertinence to the problem, we believe that they furnish some confirmation of the view that the provision was designed to be applied by the courts as well as by the administrators. The Act of June 6, 1941, 55 Stat. 242 (Public Law No. 101, 77th Cong., 1st sess.) (*infra*, p. 135) authorized the taking of foreign merchant vessels lying idle in United States waters, "*provided*, that just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended." At the Senate hearings on this measure, Admiral Land (the then Chairman of the Maritime Commission and later Administrator of the War Shipping Administration), pointed out to Senator Bailey, Chairman of the Senate Committee on Commerce, that the bill incorporated the "enhancement" clause, and agreed with the chairman's statement that "The American owners, or if we should pass this bill, the foreign owners, would not receive the extraordinary values which

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authorized by this section," which defines the term "just compensation" for the whole paragraph.

have been attached to ships on account of this war and the great many sinkings, but would receive the normal values." Hearings before the Senate Committee on Commerce, 77th Cong., 1st sess., on S. J. Res. 67 and H. R. 4466 (May 1941), p. 25.

The general requisitioning statutes enacted in World War II for the taking of property other than ships (Act of October 16, 1941, 55 Stat. 742; Second War Powers Act, 1942 (Act of March 27, 1942), Titles II, VI, 56 Stat. 177, 181) contained no "enhancement" clauses but simply referred to "fair and just compensation" or "the provision for just compensation in the fifth amendment," and leading legislative sponsors of this legislation indicated that, in their view, Congress could not validly lay down any measures of just compensation different from those traditionally applied by the courts. 88 Cong. Rec. 1778–9 (Cong. Summers). But these general requisitioning statutes did not purport to repeal or alter Section 902, and the Congressional views expressed in the fall of 1941 or the spring of 1942 by legislators not charged with maritime matters do not indicate the purpose or intention of the 1936 or 1939 Congresses regarding ship requisition. Cf. *United States* v. *United Mine Workers*, 330 U. S. 258, 281–282.

Moreover, an unsuccessful attempt was made late in 1942 to substitute the just compensation provisions of the general taking statutes for the

existing wording of Section 902. After the Comptroller General's initial ruling on the "enhancement" clause (*infra*, pp. 90–92), the Senate Committee on Commerce made this proposal in a report on the pending omnibus maritime bill (S. Rept. 1813, 77th Cong., 2d sess., pp. 3, 8–9, December 4, 1942), but the Congress adjourned without taking action on the omnibus measure, and this particular suggestion was not revived. The committee's discussion of the "enhancement" clause as a distinct limitation on amounts payable for requisitioned ships appears to indicate its then belief that the provision applied both to Commission and to court, and its proposal was a deliberate effort to change that policy.

C. *Conclusion.*—The terms and the legislative history of Section 902 thus combine, we believe, to show the purpose of Congress to apply the "enhancement" clause to judicial determinations of just compensation under that section. The opposing argument—advanced by those opponents who admit that the clause goes further than merely embodying the traditional judicially-developed doctrines of just compensation [20]—rests mainly on the canon that constitutional doubts be resolved by interpretations which do not pose issues of validity. But in this instance, to hold that the Congress intended to restrict the clause to Commission awards, as the Court of Claims did, because of doubts as to its validity when

[20] See fn. 7, *supra*, p. 22–23.

judicially applied, can be no more than formal reliance on that canon. For with Section 902 such an interpretation is wholly equivalent to a direct holding of unconstitutionality, since the results of following the canon or of directly disallowing the statute are exactly the same. There is no middle ground. A holding that the clause does not apply to the courts renders it absolutely without effect, exactly as if it had been held invalid. And such a holding has the further practical consequence of reading the clause entirely out of the statute, since the limitation would be wholly ineffective to achieve the Congressional purpose if it were restricted to the initial administrative award, as Congress must have known.

If Congress imposed the "enhancement" limitation upon the courts, as we think it did, its goal should not be frustrated by the artificial construction that it did not actually do what it intended to and supposed it had done. *Shapiro* v. *United States*, 335 U. S. 1, 31–2. This sound principle was aptly incorporated in one of the early authoritative formulations of the canon as applying to cases where the conflicting interpretations were "equally obvious." *Knights Templars' & Masons' Life Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205. Careful application of the canon is particularly important with respect to legislation trenching upon the current

borders of constitutional power, since in such areas Congress is both notably sensitive in its expressions of antipathy to accepted doctrines and hesitant to avow decisive departures. If the canon had been invoked broadly in the interpretation of much of the legislation which Congress has enacted in recent years, the operation and effect of those statutes would doubtless have been far more restricted.

In these circumstances, we suggest that it would be proper to investigate and decide the issue of the "enhancement" clause's judicial application apart from the problems of its validity. Cf. *United States* v. *Sullivan*, 332 U. S. 689, 693–4; *Ludecke* v. *Watkins*, 335 U. S. 160; *Shapiro* v. *United States*, 335 U. S. 1, 31–2. In our view, this statutory issue has a plain solution, but even if it were more difficult, we believe that it should be decided without regard to the more complex constitutional problem which remains to be unraveled.

II

The "Enhancement" Clause is Constitutional

The validity of the "enhancement" clause is supported by a proper construction of the Fifth Amendment, taken together with Congressional authority under the war power. At least when the takings are for war or defense purposes, we believe that Congress has power, within reasonable limits, to define the measure of just

compensation; and that the particular measure chosen here falls within the bounds of this legislative function. The Court of Claims' contrary view rests on the double assumptions, first, that the determination of the measure of just compensation is solely for the courts, and, secondly, that an award less than the sum the owner could secure from a private purchaser—the "current market price"—cannot constitute just compensation. In our view, both of these contentions, though finding some support in prior judicial statements, are basically unsound, and inconsistent with the scope of Congress' war powers as they have been defined by this Court.

A. CONGRESS CAN VALIDLY ESTABLISH MEASURES OF JUST COMPENSATION

1. a. The Fifth Amendment requires that "just compensation" be paid for all private property taken for public use, but it does not suggest that the federal courts alone are to develop the measures and methods of ascertaining "just compensation." Where Congress has left the determination of just compensation wholly to the courts, as has usually been done, the judiciary must, of course, decide the proper award for itself, since in those cases "the Constitution and the statutes do not define the meaning of just compensation" (*United States* v. *Petty Motor Co.*, 327 U. S. 372, 377; cf. *United States* v. *John J. Felin & Co.*,

Inc., 334 U. S. 624);[21] but that is not to say that the legislature, when it wills, cannot establish measures and methods which must be tested, not by their consonance with these detailed standards developed by the courts independently of legislative direction, but against the broad constitutional conception of "just compensation" itself. There is nothing in the Fifth Amendment denying to Congress a right, equal to that of the courts, to elaborate the content of "just compensation" in particular circumstances, or forbidding Congress reasonably to differ from the courts as to the proper measure of an award, provided always that the fundamentals of justice and fairness, embodied in the phrase "just compensation," are not violated.[22]

"Just compensation is a practical conception * * *" (*United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624, 641), and in developing the governing judicial measures, this Court has been quick to mold the rules to conform to its ideas of fairness and substantial justice. *United States* v.

[21] "Nowhere in the Constitution, however, is there any definition of 'just compensation'; and its identification both with the principle of indemnity and with an award based on the 'fair value' of the property is purely a matter of judicial interpretation or lawmaking." 1 Bonbright, The Valuation of Property (1937), p. 409.

[22] Cf. *Albrecht* v. *United States*, 329 U. S. 599, 602–603: "But the method used by courts to determine 'just compensation' in an adversary proceeding where the parties have failed previously to agree on its amount is not the exclusive method for determining that question."

Miller, 317 U. S. 369, 373–374–375; *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 280; cf. I Bonbright, The Valuation of Property (1937), p. 409, quoted fn. 21, *supra*, p. 42, and the whole of ch. XVI ("Valuation Under the Law of Eminent Domain"). As recent opinions emphasize, merely mechanical or mathematical standards have often been rejected because of the demands of equity. *United States* v. *Miller, supra*, at 373–377 summarizes the accepted rules, with great stress on the requirements of fairness; for instance, the court underscores the concept of "'*fair*' market value," and points out that "* * * strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must *in fairness* be eliminated in a condemnation case * * *" (317 U. S. at 375, italics supplied). Similarly, *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 279–280, refers to considerations of "equity and fair dealing" in determining proper measures of compensation. See also *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377–378; *United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624. Since such ideas of justice, equity, and fairness necessarily inhere in a determination of just compensation, we believe that the

[7] Hale, *Value to the Taker in Condemnation Cases* (1931) 31 Col. L. Rev. 1, is an example of an extra-judicial discussion of eminent domain rules which clearly discloses the policy factors inhering in the formulation of the doctrines in this field.

Constitution does not wholly foreclose Congress, the primary policy-making organ of the Federal Government,[21] from implementing its own views of adequacy and justice. Legislative standards must, of course, abide by the sovereign conception of the Fifth Amendment (*infra*, pp. 55–85), but they should not be thrust aside solely because Congress is their source, or because they depart from the judicially developed rules, which may represent the dominant part of the Constitution's general conception of "just compensation," but surely do not exhaust it.

b. Peremptory rejection of a legislative definition of just compensation also runs counter to the heed normally given to legislative or administrative applications of comparable Constitutional provisions of equally general scope. For instance, in determining the issue of whether property is being taken for a "public use," a requirement which the Fifth Amendment likewise

[21] "The public policy of the Government is to be found in its statutes, and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the lawmaking power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts." *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290, 340; cf. *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 514–515; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 394; *Olsen* v. *Nebraska*, 313 U. S. 236, 246–247; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 305–308–309; *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 357; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 285 (Brandeis, J. dissenting).

imposes, the settled federal rule is that the legislative declaration is entitled to nearly conclusive weight. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66; *United States ex rel. TVA* v. *Welch*, 327 U. S. 546; *Barnidge* v. *United States*, 101 F. 2d 295, 298–299 (C. A. 8); cf. *Cincinnati* v. *Vester*, 281 U. S. 439, 446.* And, of course, it is now axiomatic that, in applying the related constitutional prohibitions against deprivation of property without "due process of law" and denial of the "equal protection of the laws," the courts pay great deference to legislative and administrative determinations. *Munn* v. *Illinois*, 94 U. S. 113; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 73 *et seq.* (Brandeis, J. concurring); *R. R. Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591; *Miller* v. *Schoene*,

* It is also the established rule that Congress and the legislatures have a wide choice in picking the tribunal to determine the value of the condemned property—jury, commissioners, court, special boards. *Secombe* v. *Railroad Company*, 23 Wall. 108, 117–118; *United States* v. *Jones*, 109 U. S. 513, 519; *Bauman* v. *Ross*, 167 U. S. 548, 593; *Chicago, B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 244–245; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 695; *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 568–569; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; *Bailey* v. *Anderson*, 326 U. S. 203, 205. Cf. Section 902 (a), (d), *infra*, pp. 132, 134.

276 U. S. 272; *Euclid* v. *Amber Realty Co.*, 272 U. S. 365; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Olsen* v. *Nebraska*, 313 U. S. 236. Specific Congressional definition of the "majestic generalities of the Fourteenth Amendment" has recently even been noted as "a concrete statutory command" for the courts. *Fay* v. *New York*, 332 U. S. 261, 282–283. Likewise, Congress may formulate, within the widest limits, the "general welfare of the United States," of which the first clause of Section 8 speaks. *Helvering* v. *Davis*, 301 U. S. 619, 640–641; *United States* v. *Butler*, 297 U. S. 1, 67.[26]

There is no reason, as we see it, for setting the Fifth Amendment's just compensation provision apart from these other constitutional injunctions. "Just compensation" is of the same order of generality as "public purpose," "general welfare," or "due process of law"; and it is infused with comparable conceptions of fairness to the individual combined with advancement of the public good. Like the other broad phrases, its concrete application calls for the careful weighing of interacting policies, the evaluation of past experience, and the provision of a com-

[26] In a different context, the Court has applied the same principle in ruling that it will not normally disturb legislative findings concerning the effect upon interstate commerce of regulated or prohibited activities. *Stafford* v. *Wallace*, 258 U. S. 495, 520–521; *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191–192; *United States* v. *Darby*, 312 U. S. 100, 113–115, 119–121; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508, 527–528.

plex of specific rules—the usual work of legislatures.[27] To require payment of "just" or "fair" or "reasonable" compensation for a taking necessarily invokes a judgment as to what is "just" or "fair" or "reasonable" in the given circumstances, and there is no recognized constitutional principle—authority aside—which deprives the legislature, if it desires, of the right to make this policy judgment for itself.

c. Section 51 of the Australian Constitution authorizes the Commonwealth Parliament to make laws (among other things) with respect to "(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." It has recently been established as the law of Australia that this provision empowers the Commonwealth Parliament, within the limits of reason, to fix the acquisition terms it judges to be just, and judicial review must be guided by that power. *Minister of State for the*

[27] It is an index of the practical and theoretical difficulties inherent in the conception of just or proper compensation that Great Britain has had to refer the general subject to two expert committees, within a twenty-five year period; and both committees issued detailed reports. See Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918), Cmd. 9229 (the Scott Committee); Interim Report (1941), Cmd. 6291 and Final Report (1942), Cmd. 6386 of the Expert Committee on Compensation and Betterment (Uthwatt Committee) (referred to *infra*, pp. 66, 74–5).

Arnaj v. *Dalziel* (1944), 68 C. L. R. 261, 291 (Starke, J.), 308 (Williams, J.); *Grace Brothers Proprietary Ltd.* v. *Commonwealth*, (1946) 72 C. L. R. 269, 279–280 (Latham, C. J.), 285 (Starke, J.), 289–290 (Dixon, J.), 299 (Williams, J.).[28] Some of the justices of the High Court have distinguished the Australian provision from that of the Fifth Amendment—apparently because such decisions as *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 and *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299 (discussed *infra*, pp. 49–55), have been pressed upon them—as a grant of power rather than a restraint (68 C. L. R. at 291, (Starke, J.), at 294–295 (McTiernan, J.); 72 C. L. R. at 289–291 (Dixon, J.)); but in our view that difference, if it be one, carries with it no difference in the treatment to be accorded by the judiciary to eminent domain legislation. The Fifth Amendment's clause, as Mr. Justice McTiernan of the High Court has noted, "expresses a rule of political ethics akin to that which is recognized by the limitations in s. 51 (xxxi)" (68 C. L. R. at 294–295). We think that, like Australia's, our constitutional structure also contemplates that the determination of what is "just" payment for

[28] For pertinent excerpts from the judgments in these cases, see *infra*, pp. 62–63. Other recent cases on Sec. 51 (xxxi) are *Johnston Frear & Kinghan et al.* v. *The Commonwealth*, (1943), 67 C. L. R. 314; *Australasian United Steam Navigation Co., Ltd.* v. *Shipping Control Board* (1945), 71 C. L. R. 508.

compulsorily acquired property be primarily established by the legislature, if it wishes to exercise the power.

4. We recognize that in 1893, in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, speaking through Mr. Justice Brewer, this Court stated that the "measure of compensation * * * is a judicial and not a legislative question," and that "question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation." [*] On this point, the case may mean no more than that the legislative measure must be subject to some measure of judicial scrutiny, and that the particular Congressional measure was thought by the then Court to be entirely unreasonable. 148 U. S. at 328–345. If the opinion does mean that legislative rules of compensation have no place whatsoever, the decision rests solely on an *obiter* quotation from an early con-

[*] The Act of August 11, 1888, 25 Stat. 400, 411, authorized the condemnation, by proceedings in a federal circuit court, of the Company's lock and dam in the Monongahela River, and authorized the proceedings to follow Pennsylvania law, "*Provided*, That in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated * * *." This franchise to collect tolls for the use of the lock and dam had been granted by the state of Pennsylvania. Holding that the *proviso* was not binding on it, the Court disregarded the limitation imposed by the statute. 148 U. S. at 327–328.

curring opinion of a single justice in a case coming from a state court, in which the legislature fixed a specific dollar sum as proper compensation (McLean, J. in *Charles River Bridge Props.* v. *Warren Bridge Props.*, 11 Pet. 420, 571), and on three state cases, one of which (*Com.* v. *Pittsburgh & C. R. Co.*, 58 Pa. 26, 50) holds only that the legislative measure was invalid as entirely arbitrary, another of which (*Penn. Rd. Co.* v. *Baltimore & Ohio Rd. Co.*, 60 Md. 263, 269) stands on a unique state constitutional provision, and the third (*Isom* v. *Mississippi Central Rd.*, 36 Miss. 300, 315) employs the principle of sole judicial competence to adopt a substantive rule (regarding the offsetting of benefits) which was later rejected by this court in *Bauman* v. *Ross*, 167 U. S. 548 (upholding a statute requiring offset of benefits to an owner's remaining lands).[30]

We have been unable to find any material in the debates on the adoption of the Fifth Amendment which is helpful in deciding the correctness of the *Monongahela* principle.[31] Some later

[30] The Company's brief in the *Monongahela* case contained only twelve lines on this point, including a citation of the four cases on which the court relies. Oct. T. 1892, No. 722, Appellant's Brief, pp. 32–33. The Government's brief did not mention the point at all, but argued that the statute's *précisa* (fn. 29, *supra*, p. 49) was substantially a correct measure of just compensation in this instance.

[31] Warren, *New Light On the History of the Federal Judiciary Act of 1789* (1923), 37 Harv. L. Rev. 49, 111 *et seq.*

nineteenth-century state cases and textwriters may have announced similar broad views of legislative impotence, though their attack appears to have been largely directed against attempts by state legislatures to fix actual compensation amounts. *Langford* v. *Commissioners*, 16 Minn. 375, 379–380; *Rich* v. *City of Chicago*, 59 Ill. 286, 292–296; *Tripp* v. *Overocker*, 7 Colo. 72; Mills, Eminent Domain (1879) sec. 85; Smith, Commentaries on Statute and Constitutional Law (1848), sec. 318; p. 471; Cooley, Constitutional Limitations (1868) 563; cf. *Cox & Hill* v. *Cummings*, 33 Ga. 549, 555–559 (Confederate constitution); *Cunningham* v. *Campbell*, 33 Ga. 625, 628 *et seq.* (same). But nineteenth-century judicial expressions of the binding nature of legislative measures of just compensation are not lacking,[22] and Mr. Justice Brewer's principle

gives a general account of this legislative history. We have examined the relevant Annals of Congress without avail.

[22] See *McMasters* v. *Commonwealth*, 3 Watts 292, 295 (Pa. 1834) ("As the legislature have the undoubted right to determine when the public interest requires the assumption of private property, so it seems to me the better construction of the constitution, that it shall rest in their wisdom to determine the nature and kind of the compensation to be made, and also to point out the tribunal by whom the amount may be ascertained."); *Fenelon's Petition*, 7 Pa. 173, 175 (1847) ("Compensation must be made when private property is taken for public use, but the mode, manner and criteria of amount of that compensation is not a matter for judicial, but by legislative proceeding"); *Chesapeake & O. Canal Co.* v. *Key*, Fed Cas. No. 2649, 5 Fed. Cas. 563, 564 (C. C. D. C. 1829) ("But the constitution only provides for the general principle. The means of ascertaining the just compensation

cannot be said to have been crystallized into general acceptance, before the decision of the *Monongahela* case in 1893.

Despite its date, that opinion came at the very beginning of this Court's serious consideration of the "just compensation" clause of the Fifth Amendment; and undoubtedly the Court's

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were left to be decided by the public authority, which should give the power to take private property for public use").

[33] For almost the first century of its existence, the Federal Government normally acquired property, when it resorted to eminent domain, by making use of state legislation and state proceedings (except in the District of Columbia or the territories), or by having the state condemn the property on behalf of the United States. *Kohl* v. *United States*, 91 U. S. 367, 373–374; *United States* v. *Jones*, 109 U. S. 513, 519–520; 1 Federal Eminent Domain (Government Printing Office, 1940) pp. 1–5; cf. *Harris* v. *Elliott*, 10 Pet. 25 (example of condemnation under state law). Some statutes authorizing federal condemnation proceedings for individual projects were passed in the 1870's, and the Federal Government's power to take this step was first challenged and upheld in the *Kohl* case (1876). The initial general statutes relating to federal condemnation proceedings were the Tucker Act of 1887, 24 Stat. 505; the Act of April 24, 1888, 25 Stat. 94, 33 U. S. C. 591 (authorizing condemnation for river-and-harbor purposes); and the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257–8 (general land condemnation act).

There was almost no occasion for this Court to review *state* just compensation matters before the adoption of the Fourteenth Amendment, since the Fifth Amendment did not apply to the states. *Barron* v. *Baltimore*, 7 Pet. 243. After the Fourteenth Amendment became a part of the Constitution, the Court first suggested that, unlike the Fifth Amendment, it did not require just compensation for a taking (*Davidson* v. *New Orleans*, 96 U. S. 97, 105 (1877)), and it was not until 1897 that it was definitively held that the later

molding of the constitutional provision reflected the special concern of the opinion's author and of the bench of that day with judicial limitations on legislative authority. Cf. Corwin, *The Supreme Court and the Fourteenth Amendment* (1909), 7 Mich. L. Rev. 643; Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment* (1922), 20 Mich. L. Rev. 737, 741–753; Jackson, The Struggle for Judicial Supremacy (1941), pp. xvii–xix; Corwin, Court Over Constitution (1938), pp. 197–199; Twiss, Lawyers and the Constitution (1942). The Monongahela doctrine of sole judicial competence to prescribe the measures of just compensation was twice repeated by Mr. Justice Brewer, by way of outright dictum, in *Reagan* v. *Loan & Trust Co.*, 154 U. S. 362, 410 (1894) and *Fairbank* v. *United States*, 181 U. S. 283, 300–301 (1901). But it was almost a quarter of a century before the principle next reappeared in this Court's judgments:—in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 304 (1923).[34] The Monongahela principle was thereafter quoted or paraphrased in *United States* v. *New River*

amendment did require such compensation. *Chicago, B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 233–241 (1897); see also *Sweet* v. *Rechel*, 159 U. S. 380, 398–9 (1895) [cf. *Adamson* v. *California*, 332 U. S. 46, 79–80].

[34] Compare *Bauman* v. *Ross*, 167 U. S. 548, 569, 573, 584 (1897), upholding a federal statute (pertaining to the District of Columbia) requiring the offset of benefits to the owners' remaining lands.

Collieries Co., 262 U. S. 341, 343–344; *Davis* v. *Newton Coal Co.*, 267 U. S. 292, 301, and *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 365, 367–368. But in none of these cases was the statement of the principle at all relevant to the decision, since Congress had not attempted to formulate any measures of just compensation in the statutes there involved. In short, the principle's only effective application, in this Court, has been in the 1893 case in which it was born.[35]

Congress purposefully adopted the "enhancement" clause of Section 902 (a) in 1936, after a long gestation period, and in 1939 it deliberately reaffirmed the provision. *Supra*, pp. 25–35. We urge that this legislative choice be not frustrated by application of a principle which is incorrect and inconsistent with governing constitutional principles. The Monongahela doctrine—which in any case can hardly be said to be deeply embedded in our constitutional jurisprudence—should be reexamined and discarded. "That which seems vain and capricious to one generation may become the wisdom of the next." *Peo-*

[35] In *Norcross* v. *Cambridge*, 166 Mass. 508, 511 (1896), the Supreme Judicial Court refused to invalidate a statute authorizing the payment of interest only from the date of actual taking of possession, although the accepted rule in that state required interest to accrue from the time of the formal paper taking. "We think, however, that the rule cannot be held so far to express a matter of common right that a departure from it by the Legislature in a statute authorizing a taking by eminent domain would render the statute in which it occurred wholly or partly unconstitutional."

ple v. Beakes Dairy Co., 222 N. Y. 416, 428 (Pound, J.); cf. *Klein v. Maravelas*, 219 N. Y. 383, 386 (Cardozo, J.).

B. THE "ENHANCEMENT" CLAUSE IS A PROPER MEASURE OF JUST COMPENSATION

1. *General standard of judicial supervision of Congressional measures of just compensation.*— If Congress can validly establish legislative measures of just compensation, what are the limits of its power? The answer, in so far as this Court is concerned, will be found, we think, in the doctrines which have controlled review, under the Fourteenth Amendment, of state eminent domain cases coming from state courts. In the major cases,[37] while insisting that the Fourteenth

[36] The other point in the *Monongahela* case, *i. e.* that the company was constitutionally entitled to have the value of its franchise considered on a taking, has already been severely limited. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U. S. 82, 89–90; *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U. S. 251, 264–266; *Louisville Bridge Co. v. United States*, 242 U. S. 409, 421–423; *Omnia Commercial Company v. United States*, 261 U. S. 502, 513–514; *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281, 282. On this phase of the *Monongahela* case, see Edgerton, *The Incidence of Judicial Control Over Congress* (1937), 22 Corn. L. Q. 299, 305–306.

[37] *Chicago, B. & Q. Rd. Co. v. Chicago*, 166 U. S. 226; *Backus & Sons v. Fort Street Union Depot Co.*, 169 U. S. 557; *Appleby v. Buffalo*, 221 U. S. 524; *McGovern v. New York*, 229 U. S. 363; *McCoy v. Union Elevated R. Co.*, 247 U. S. 354; *Roberts v. City of New York*, 295 U. S. 264. Cf. Orgel, Valuation under the Law of Eminent Domain (1936), sec. 8, pp. 37–41.

Amendment requires payment of just compensation for a taking (*Chicago, B. & Q. Rd. Co.* v. *Chicago*, 166 U. S. 226, 233–241), the Court has refused to set aside state condemnation judgments as violative of the Due Process clause, unless the owner can show extreme callousness toward his right to a fair payment. In the *Chicago* case (where an award to the railroad of one dollar was upheld), Mr. Justice Harlan said that the Court's inquiry was limited to ascertaining whether the state court's rulings of law were in "*absolute disregard* of the company's right to just compensation," or if they had prevented the company "from obtaining *substantially any compensation.*" 166 U. S. at 246, 247. *Backus* expressly reaffirmed these words of self-limitation (169 U. S. at 565, 575–6, 578) and suggested, in addition, that the award must be "in *reckless disregard*" of the owner's rights before any constitutional issue could be reached. 169 U. S. at 566. *Appleby* v. *Buffalo* confirmed the earlier formulations (221 U. S. at 530–2), as did *McGovern* (which also speaks of a "*disregard of plain rights*") (229 U. S. at 370–1, 373, per Holmes, J.), and the *McCoy* case (247 U. S. at 363, per McReynolds, J.). Mr. Justice Cardozo summarizes the doctrine, in his *Roberts* opinion, as staying this Court's intervention unless the state court's error "*be gross and obvious, coming close to the boundary of arbitrary action.*" 295 U. S. at 277–8. [All italics supplied.]

These standards of constitutional review,[38] hitherto applied to state condemnation decisions, may appropriately be borrowed as criteria for judging the validity of Congressional measures of just compensation.[39] The federal courts certainly owe no greater deference to state courts

[38] *I. e.* (1) "absolute disregard" of the owners' right to just compensation; (2) whether he has been barred "from obtaining substantially any compensation"; (3) "reckless disregard" of the owners' rights; (4) "disregard of plain rights"; (5) a "gross and obvious" error, "coming close to the boundary of arbitrary action."

[39] The *Chicago* line of cases deal with state judicial decisions on just compensation, and not with state statutes, but it is clear that the Court's standard of review applies to general rules of law and measures of compensation, and not merely to individual findings of fact or the specific process of valuation of specific property. The opinions refer to "any rule of law," to "rulings upon questions of law," and to "rulings of law" (166 U. S. at 246, 247; 169 U. S. at 565, 578; 221 U. S. at 531-2-3; 229 U. S. at 371; 247 U. S. at 363; 295 U. S. at 278). Indeed, the *McGovern* case expressly treats the error complained of as a ruling on the "measure of damages," and holds that "if the rulings complained of be taken as universal propositions they present no element of the arbitrary even if they should be thought to be wrong." 229 U. S. at 371, 372. And *McCoy* states: "Our concern is not to ascertain whether the rule adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundamental right." 247 U. S. at 363.

In his judgment in *Grace Brothers Proprietary, Ltd.* v. *The Commonwealth* (1946), 72 C. L. R. 269, 291, Dixon, J., refers to Mr. Justice Cardozo's statement in *Roberts* v. *New York*, 295 U. S. 264, which we quote above, in his discussion of judicial review of Commonwealth compulsory acquisition legislation under the Australian "just terms" provision. See, *supra*, pp. 47-49; *infra*, pp. 61-64.

and legislatures than to the Congress, and the Fifth Amendment imposes no more severe restrictions upon the Federal Government than the Fourteenth places upon the states. *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 278–9; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156; *Woods* v. *Miller Co.*, 333 U. S. 138, 145. In any area of the law, it would be anomalous to sanction stricter judicial control of federal legislation than of state rules, unless the Constitution expressly required the difference. And it would be doubly anomalous to require closer judicial control of Congressional measures of "just compensation," a subject intimately allied with those other fields in which the Court's supervision has been markedly relaxed in recent years or wholly disavowed.[*]

The tests developed by the Court for state eminent domain seem to us to grasp the solid core of the Fifth Amendment's prescription that just compensation be paid by the public when it requisitions private property. This central conception is that the owner's property must not be confiscated without payment, that the sovereign

[*] Cf., *e. g.*, *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Carolene Products Co.* v. *United States*, 323 U. S. 18, 31–2; *Olsen* v. *Nebraska*, 313 U. S. 236; *Federal Power Comm.* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 582, 585–6, 599–601; *Demorest* v. *City Bank Co.*, 321 U. S. 36; *East New York Bank* v. *Hahn*, 326 U. S. 230; *Fernandez* v. *Wiener*, 326 U. S. 340; *North American Co.* v. *S. E. C.*, 327 U. S. 686, 707–710; *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 82–5; *Osborn* v. *Ozlin*, 310 U. S. 53, 65–67.

must pay some reasonable award or exchange for the property, that fair compensation be made to the owner. Cf. *Lynch* v. *United States*, 292 U. S. 571, 579–580. But it is no part of the historic concept which the Fifth Amendment incorporates, that the Government must measure this award by any particular standard, be it "market value" or some other. So long as it does not bar the owner from "obtaining substantially any compensation," or act in "absolute" or "reckless disregard" of his interests, or commit a "gross and obvious" error "coming close to the boundary of arbitrary action"—the legislature has power to determine what is the proper measure of "just compensation" in particular situations with which it deals. In short, the Constitution protects the fundamental right to be free of confiscation; it does not prescribe any particular measure, amount, or standard of compensation, but authorizes the Congress, within the bounds of reasonableness, to make those choices.[1]

[1] The debates on the adoption of the Fifth Amendment cast no light on the meaning which the "just compensation" clause was thought to have. See *supra*, pp. 50–51. James Bradley Thayer [1 Cases on Constitutional Law (1895), p. 945] suggests that the pertinent writings of Grotius and other early publicists "bring out the conceptions upon this subject which the framers of our first constitutions entertained." Grotius says, (in general terms which contain no reference to particular measures like "market value"), that in exercise of the power of eminent domain, "compensation from the public funds [should] be made, if possible, to the one who has lost his right," and the "state is bound to make good at public expense the damage to those who lose their property."

This view does not conflict with the just compensation rules and doctrines elaborated by this Court in the past sixty years, since the *Monongahela* case. For the cases that have arisen have not involved any legislative measures or standards different from those developed by the courts, and the Court has not had occasion—with the single exception of the *Monongahela* case—to pass upon such legislative efforts. The rules and standards pronounced by the Court have all been in cases in which Congress has referred the entire problem of just compensation to the judiciary, without establishing any measures of its own. In those cases, the Court has necessarily been free to announce policies and fix its own

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De Jure Belli ac Pacis, Bk. II, ch. 14, sec. 7, Bk. III, ch. 20, sec. 7 (Classics of Int. Law trans. of 1646 ed.). Vattel states that "justice requires that compensation be made to the community or the individual from the public treasury; and if the treasury cannot meet the charge upon it, all the citizens are bound to contribute to it for the burdens of the State should be borne equally by all, or in just proportion." Le Droit des Gens, Bk. I, ch. 20, sec. 244 (1758). Blackstone refers somewhat overbroadly to the "great * * * regard of the law for private property," and says that the sovereign does not act "by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained," which he sums up as "a reasonable price." 1 Commentaries 139 (Chitty's ed. 1866). See generally, on early conceptions of eminent domain, Grant, *The "Higher Law" Background of the Law of Eminent Domain* (1931), 6 Wis. L. Rev. 67; Lenhoff, *Development of the Concept of Eminent Domain* (1942), 42 Col. L. Rev. 596.

measures. *Supra*, pp. 41–42. The difficulties and the perplexities revealed by the corpus of judicial rules of just compensation (1 Bonbright, The Valuation of Property (1937), ch. XVI) strongly suggest the tentative character of these standards. And we think that the Court recently recognized the potential existence of other valid approaches when it said: "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose." *United States* v. *Miller*, 317 U. S. 369, 373–4; cf. *Albrecht* v. *United States*, 329 U. S. 599, 602–3; *supra*, p. 42; *Norcross* v. *Cambridge*, 166 Mass. 508, 511, *supra*, p. 54. *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377. If, however, some of the specific rules which have been laid down were intended to bind Congress as well as the courts, we believe that *obiter* assumption of power to have been erroneous—as this entire brief attempts to prove.

We have already pointed out (*supra*, pp. 47–49) the similarity between the "just terms" provision of the Australian Constitution and our "just compensation" clause, and the view recently taken by the High Court on the narrow limits of its reviewing function. *Minister of State for the Army* v. *Dalziel* (1944), 68 C. L. R. 269; *Grace Brothers Proprietary, Ltd.* v. *The Common-*

wealth, 72 C. L. R. 269.* We urge that the judicial orientation in passing upon Congressional measures of just compensation should be the same. A statute should not be set aside because it departs from "the ordinary established principles of the law of compensation for the

* Starke, J. (68 C. L. R. at 291, reiterated in 72 C. L. R. at 285):

"Under the Australian Constitution the terms of acquisition are, within reason, matters for legislative judgment and discretion. It does not follow that terms are unjust merely because 'the ordinary established principles of the law of compensation for the compulsory taking of property' have been altered, limited or departed from, any more than it follows that a law is unjust merely because the provisions of the law are accompanied by some qualification or some exception which some judges think ought not be there. The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men."

Latham, C. J. (72 C. L. R. at 279–280):

"Some criticism of the justice of terms of acquisition of property could often be advanced with some reason. I do not think the terms of s. 51 (xxxi.) entitle the Court to declare a statute providing a general method for the acquisition of property invalid because in particular cases it was possible to devise a more just scheme. The Court should not, in my opinion, hold such legislation to be invalid unless it is such that a reasonable man could not regard the terms of acquisition as being just.

"Justice involves consideration of the interests of the community as well as of the person whose property is acquired * * *."

Dixon, J. (72 C. L. R. at 291–2):

"In deciding whether any given law is within the power [section 51 (xxxi).] the Court must, of course, examine the justice of the terms provided. But it is a legislative function to provide the terms, and the Constitution does not mean to deprive the legislature of all discretion in determining

compulsory taking of property" (68 C. L. R. at 291, 308), or "the provisions of the law are accompanied by some qualifications or some exception which some judges think ought not be there" (68 C. L. R. at 291), or the "Court entertain[s] an opinion that other terms would appear to be

what is just. Nor does justice to the subject or to the State demand a disregard of the interests of the public or of the Commonwealth * * *. Under s. 51 (xxxi) perhaps the test may be whether the provisions might reasonably be regarded as just * * *. Its logic, efficacy or wisdom is not the matter in question. Nor do I think that we are required to test its validity by imagining conditions in which its operation might cease to be just * * *." (See, also, fn. 39, *supra*, p. 57).

Williams, J. (68 C. L. R. at 308, reiterated in 72 C. L. R. at 299):

"I agree with the contention that an Act in order to contain just terms need not necessarily comply in all respects with all the principles of the common law relating to the compulsory acquisition of property."

McTiernan, J. (72 C. L. R. at 295):

"It follows that Parliament has a discretion not only to provide for the acquisition of any property but also to enact the just terms which it thinks fit to be part of any law which it makes in pursuance of this power. In my opinion, if the terms enacted by Parliament might reasonably be regarded as just terms, there is no ground for holding that the law is not a law with respect to the acquisition of property on just terms. The question whether the terms enacted by Parliament might reasonably be regarded as just terms is for the Court to decide. If the Court decides that the terms might reasonably be regarded as just it will not declare the terms unjust and in excess of the power, even if the Court entertained an opinion that other terms would appear to be fairer. The words 'just terms' imply that the terms of acquisition should be just as between the owner of the acquired property and the Commonwealth."

See, also, *supra*, p. 48 and *infra*, pp. 72-3, 76.

fairer" (72 C. L. R. at 295), or "in particular cases it was possible to devise a more just scheme" (72 C. L. R. at 279), or because the Court can imagine "conditions in which its operation might cease to be just" (72 C. L. R. at 292).

2. *The "enhancement" clause and the Fifth Amendment.*[45]—Measured by the general criteria we have just discussed, the "enhancement" clause cannot be questioned. It is wholly reasonable. Plainly, it does not deprive the shipowner of all compensation, nor can it be termed an "absolute or arbitrary or reckless disregard" of his rights. Both the Comptroller General's and the Advisory Board's interpretations (*infra*, pp. 105–113) would normally give the owner a substantial award.[46] In the present case, for instance, the administrative offer of $9,000 (R. 5) was substantially greater than respondent's total investment of $8,574.78 in the *MacArthur* (R. 8–9).

a. The Court of Claims intimates that the special vice of the clause lies in its subtraction of

[45] We do not differentiate, in our discussion of the "enhancement" clause's validity, among the various current interpretations of its scope and content (*i. e.*, the measure of excluded enhancement), because we think the statute valid whichever construction be adopted. In Point III, we discuss the major interpretations, and also point out that each is valid under the constitutional principles we urge to be controlling. See *infra*, pp. 123–4.

[46] The widespread acceptance of the War Shipping Administration's awards of just compensation tends to indicate, at the least, that these awards were not in reckless disregard of owners' rights.

a sum from the vessel's current market value (R. 14). This is concededly the effect of the statute in this and many other cases, but invalidity does not follow from a failure to award current market value. It is old law, even for judicial determinations of just compensation, that "'market value is not a universal test, and cases often arise where some other mode of ascertaining value must be resorted to.'" *Beale* v. *Boston*, 166 Mass. 53, 55.* For instance, the system of judicial rules for determining just compensation requires deductions from current market value for benefits to the owner's remaining property (*Bauman* v. *Ross*, 167 U. S. 548); for increased value resulting from the initiation of the general condemnation project (*United States* v. *Miller*, *supra* at 376–7); and for enhancement "arising from the prospect that the Government" would acquire that very property (*Olson* v. *United States*, 292 U. S. 246, 251, 261). Determinations of current market value must also exclude elements of value arising from the owner's desire to retain the property or from the taker's special need (*United States* v. *Miller*, *supra*, at p. 375; cf. *United States* v.

* This Court's recent characterization of the "so called 'market value'" rule as a "practical standard" from which "in fairness" certain elements of value must be eliminated (*United States* v. *Miller*, 317 U. S. 369, 374, 375) and as a "reasonably satisfactory" measure (*United States* v. *Petty Motor Co.*, 327 U. S. 372, 377) indicates that it is not regarded as sacrosanct. Cf. 1 Bonbright, The Valuation of Property, pp. 412–419, 447–449; *United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624.

Chandler-Dunbar Co., 229 U. S. 53), as well as value attributable to the owner's state-created privilege to use the power of eminent domain, which would enable it to combine the condemned tract with other parcels for water-power purposes (*United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 275–6, 281, 283, 285). In these cases, considerations of equity and fairness have impelled the Court to award a condemnee less than he could probably have secured from "private parties for their own use" (R. 16).[66]

Similarly, in Section 902 (a), Congress has determined—in the direct light of governmental experience with the purchase and requisition of

[66] The High Court of Australia has recently upheld a statute, as taking property on "just terms," which departed from current market price by requiring land to be valued as of January 1st of the year in which it was taken. *Grace Brothers Proprietary, Ltd.* v. *The Commonwealth*, (1946), 72 C. L. R. 269; *supra*, pp. 47–8, 61–4.

The British Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), section 2 ("Rules for the assessment of compensation") laid down, as one of its rules, that "(4) where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is *detrimental to the health of the inmates of the premises or to the public health*, the amount of that increase shall not be taken into account." (Italics added). This clause was suggested by the Scott Committee (fn. 27, *supra*, p. 47) largely in order to bar tenement owners from reaping the extra market value induced by overcrowding, failure to maintain good sanitary conditions, etc. Second Report of the Committee Dealing with the Law and Practice Relating to the Acquisition and Valuation of Land for Public Purposes (1918), Cmd. 9229, p. 9.

ships in World War I—that equity and fairness require a shipowner to accept, in times of war or of a national-defense emergency, less than his ship's current market value, to the extent that that value has been "enhanced by the causes necessitating the taking." This measure of compensation was designed to eliminate war profiteering,[47] and to cut down inflated wartime scarcity prices for vessels urgently needed by the Government, at the same time according the owner fair compensation at normal price levels. *Supra*, pp. 25–38; *infra*, pp. 92–103.[48] Congress, it

[47] Respondent, for example, invested a total of $8,574.78 in the *MacArthur* (R. 8–9), and the court below awarded him $15,500 (R. 12); this amounts to a profit of approximately 80% after an ownership of seven months.

[48] In his 1921 Report, as Chairman of the War Industries Board, Bernard M. Baruch said, regarding the rule that "just compensation" is measured by market value (American Industry in the War, 1941 ed., p. 79):

"*In the war, market value was largely created by the Government's emergency, and hence it was not a fair test of just compensation.* If an examination be made into the reasoning behind the proposition that market value is a sound measure of just compensation, it will be found that the principle is based on the economic doctrine prevailing when the rule was first pronounced. This doctrine taught that under the automatic working of the law of supply and demand, 'market value' always tends to become equal to the 'cost of production,' and for this reason market value is a measure of 'just compensation.'

"Adam Smith taught that the iron law of nature would always bring about its balance—things will sell for what they are worth, and they are worth what they will sell for—which, he said, was always in the long run what it cost (including a reasonable profit) to produce them; and he illustrated by a series of examples taken from spheres of life

may be said, has thus given its reasonable interpretation of the traditional eminent domain concept of "*fair* market value," which this Court has said denotes what "it *fairly* may be believed that a purchaser in *fair* market conditions would have given" (*New York* v. *Sage*, 239 U. S. 57, 61), or, on another occasion, "market value *fairly* determined." *Olson* v. *United States*, 292 U. S. 246, 255. See, also, *United States* v. *Miller*, 317 U. S. 369, at 374–5, pointing out that certain elements inherent in a "strict adherence to the criterion of market value" must "be disregarded by the fact finding body in arriving at '*fair*' market value." [Italics supplied]. The use Congress made of the "enhancement" clause, in fixing the measure of the "fair" market value for requisitioned ships, does not differ markedly from the action of some courts (uninstructed by legislation) in refusing to fix market value by boom or depression prices, and insisting on "normal" prices. Cf. Orgel, Valuation Under

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where economic relations were very simple. Whether this principle be generally true or not, it was certainly not true under war conditions. *When a demand in the nature of a war demand—absolute and unabated by considerations of a return in value—enters the field, there is no force tending naturally to adjust the market value to cost of production.* Hence, it was found necessary to go back to the more elemental principle and measure just compensation by its primary cause, *viz.* cost of production, including a reasonable profit. This was the principle adopted by the War Industries Board." [Italics supplied.]

the Law of Eminent Domain (1936), secs. 23, 24." We believe that this Court's principles for reviewing state condemnation cases (*supra*, p. 55–57) would not permit it to overturn such state court decisions, and, by like token, a Congressional standard of the same character should not be set aside.

From another viewpoint, what Congress did was to adapt, enlarge, and elaborate the judicial just compensation rule (recently applied by this Court in *United States* v. *Miller*, 317 U. S. 369, 377) that the owner is not entitled to the increment of value due to the initiation of the gen-

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[49] Boom prices: *Suburban Land Co., Inc.* v. *Arlington*, 219 Mass. 539, 541 ("And, as a test of value, we are not inclined to say that the price which is established artificially and temporarily by booming methods should be regarded as equivalent to the market value which is regulated by the natural laws of supply and demand."); *Kansas City, W. & N. W. R. R. Co.* v. *Fisher*, 49 Kan. 17, 18; *Blincoe* v. *Choctaw, Okla. & W. Ry Co.*, 16 Okla. 286; *Howell* v. *State Highway Dept.*, 167 S. C. 217, 223 ("* * * if the taking be during a period of inflated prices, it would be just as unfair to the condemnor to fix the value as of that exact period.")

Depression prices: *United States* v. *Inlots*, Fed. Cas. No. 15, 441a (C. C. S. D. Ohio), 26 Fed. Cas. at pp. 490, 494–5 (jury not to take account of "a temporary depression and stringency of the money market"), affirmed *sub nom. Kohl* v. *United States*, 91 U. S. 367; *Howell* v. *State Highway Dept.*, 167 S. C. 217, 223 ("It would be manifestly unfair to the owner if the taking of the property be during a period of deep depression to fix the value as of that exact date").

There are, of course, many decisions distinctly to the contrary. See *Alishausky* v. *MacDonald*, 117 Conn. 138, 141–2, the war requisition cases cited in fn. 68, *infra*, p. 93; and the other cases cited in Orgel, *op. cit. supra*, secs. 23–25.

eral project, if his property was probably—but not necessarily—within the scope of the project from the beginning. And the excluded increment in value consists not only of the enhancement due to the probability that the condemnor will take that particular property, but also of the increase "calculated on the theory that if they [*i. e.* the plaintiff's lands] had not been taken they would have been more valuable by reason of their proximity to the land taken," on which the Government had erected the improvement. 317 U. S. at 376, 379.[30] In effect, Section 902 of the Merchant Marine Act announced, in 1936, that thereafter in times of war or of national emergency (as had been true in World War I) the Government's need for a pool of vessels to transport men and supplies would probably require the undertaking of a general federal shipping project, in which many merchant vessels might be taken and others used while still in private hands, and that, in such event, the owner of a ship which happened to be requisitioned as part of this "general project" could not claim any increment of value attributable to the actual or prospective initiation of the "pool project." The statute would serve, on this view, to eliminate any increase in value or market price flowing from or due to the Gov-

[30] State just compensation cases applying this rule are, *e. g. Dargan* v. *Boston*, 94 Mass. 223, 251; *Benton* v. *Brookline*, 151 Mass. 250, 257–258; *May* v. *Boston*, 158 Mass. 21, 29–30; *St. Louis Electric Terminal Ry.* v. *Mac Adaras*, 257 Mo. 448, 463–469.

ernment's general need of vessels to carry on the war or to further the national defense, as well as from the Government's compulsory takings, actual or prospective.[51] Congress was fully entitled, we believe, to mark this measure of award (an extension of an accepted judicial rule) as adequate, reasonable and fair—as properly the just compensation prescribed by the Constitution.

b. The intrinsic fairness of the "enhancement" clause is attested not only by these theoretical justifications but by the comparable measures adopted in World War II by others of the democratic combatants, which have long followed the principle of awarding just compensation for requisitioned property. The British Compensation (Defense) Act, 1939 (2 & 3 Geo. 6, ch. 75, Sept. 1, 1939) provided in Section 4 that "no account shall be taken of any appreciation in the value thereof [*i. e.* of "vessels, vehicles, or aircraft"] due to the emergency." The Canadian Compensation (Defense) Act, 1940 (4 Geo. VI, ch. 28, August 7, 1940), provided that "no account

[51] Respondent certainly knew, when he bought the *Mac Arthur* in March 1942 (R. 8), that such a "general shipping project"—including not only actual requisitions but the full use of all available private vessels—had been begun well before the attack on Pearl Harbor, and that the ship market did (and would) progressively reflect the existence and course of the "project." His own vessel was unlikely to be taken, as the court found (R. 13), but he must have known that its market value was and would be further enhanced by the Government's general shipping activity. See *infra*, pp. 124–127.

shall be taken of any appreciation in the value thereof [*i. e.* vessels and aircraft] due to the war." New Zealand's Shipping Requisitioning Emergency Regulations, 1939, Amendment No. 1 (November 29, 1939) provided that the price to be paid for a vessel the title of which was requisitioned "shall be the fair market value thereof at the date of acquisition together with any special value to the owner due to the use made by him of the vessel but excluding any enhancement of value arising from war conditions and their effect on the market, and excluding also any consideration of special value due to the fact that it is a component of a fleet or service" (Statutory Regulations 1939, p. 1004).[52] The Australian "Basis of Compensation Order" (issued under Regulation 60 H of the National Security (General) Regulations) provided that in computing an award for interests in land "no account shall be taken of any appreciation of values due to the war," and, in another connection, excluded "any increase in rental value attributable to the war."[53]

[52] These regulations were adopted under the Emergency Regulations Act, 1939 (September 14, 1939), 3 Geo. VI, 1939, No. 8, Section 3 of which grants power to make regulations "authorizing the acquisition, on behalf of His Majesty, of any property" and "authorizing the taking of possession or control, on behalf of His Majesty, of any property or undertaking."

[53] The Australian Basis of Compensation Order was invalidated by the High Court as failing to provide the "just terms" required by section 51 of the Australian Constitution (*supra*, pp. 47–8, 61–4), but the war "enhancement" clause,

Article 23 of the French law of July 11, 1938 (concerning wartime requisition, *inter alia*) provided that "* * * the indemnities due as a result of requisition shall be calculated by taking account only of the actual loss which the definitive or temporary dispossession imposes on the prestator [*i. e.* owner] on the day of requisition, exclusive of the profit which the free disposition of the property might procure him and of any rise in prices produced by speculation or monopoly or any other circumstances imputable to the state of war or of external tension." Journal Officiel, July 13, 1938, p. 8330; Wise, Requisition in France and Italy (1944), pp. 13–14, 20, 49–51, 85.[54]

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referred to above, was not the ground for the invalidation. *Minister of State for the Army* v. *Dalziel*, 68 C. L. R. 261 (1944); *Minister of State for the Army* v. *Pacific Hotel Pty Ltd.*, noted at 68 C. L. R. 310 (1944). Only two of the five justices discussed the "enhancement" clause (Latham, C. J. and Starke, J., who dissented from the general invalidation of the Order), and both apparently thought it clearly valid. 68 C. L. R. at 293, 310–2. Starke, J. commented: "Again, the direction that no account shall be taken of any appreciation of values due to the war is also, I suppose, a provision to which exception is taken [by counsel for the owner]. *But that kind of provision has been common in Compensation Acts for many years and there is nothing unreasonable or unjust about it.*" 68 C. L. R. at 293. [Italics supplied.]

[54] A previous French law on the general organization of the nation for time of war contained a similar provision concerning "an increase of prices illicitly brought about by speculation or the cornering of the market or by other circumstances imputable to war." See H. Doc. 163, 72d Cong., 1st sess., pp. 878–9.

In World War I, the British Defense of the Realm (Ac-

Also significant in this connection are the proposals of Great Britain's Expert Committee on Compensation and Betterment (the Uthwatt Committee) in 1941–1942. The Committee proposed (1) that all land taken in England for post-war reconstruction be valued by the "standard of 'pre-war values,'" *i. e.*, values as of March 31, 1939, and (2) that the 1919 statutory rules as to compensation for land-takings [Section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919] be amended specifically to provide that "no account shall be taken of any increased value or element of value arising from the actual or possible demands for the land or other land by any government department, local or public authority, or any statutory undertaker; or arising from the existence of or proposals for, or the probability or possibility of the land or other land becoming subject to, any public scheme

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quisition of Land) Act, 1916 (December 22, 1916), 6 & 7 Geo. 5, ch. 63, provided that in determining the amount of compensation for land compulsorily acquired for war purposes, "the value of the land acquired shall be taken to be the value which the land would have had at the date [of taking] if it had remained in the condition in which it was at the commencement of the present war, without regard to any enhancement or depreciation in the value which may be attributable directly or indirectly to any buildings, works, or improvements, erected, constructed, or made on, over or under the land, or any adjoining or neighbouring land for purposes connected with the present war wholly or partly at the expense of the State, or, with the consent of the occupying department, at the expense of any person not being a person interested in the land * * *" (Schedule, par. 6).

of development, redevelopment, or reconstruction (including schemes of preservation from development) or from any works done or to be done or any change of user under any such scheme." See Interim Report (dated 25th April 1941), Cmd. 6291, pp. 4–5; Final Report (dated 14th August 1942), Cmd. 6386, pp. 77–79, 80–81, 86, 103.[55] The proposal as to a March 31, 1939, ceiling on land values was adopted by the United Kingdom Government in July, 1941 (119 Parliamentary Debates, House of Lords, 849–850), and enacted into legislation (for a five-year period) by Section 57 of the Town and Country Planning Act, 1944, 7 & 8 Geo. 6, ch. 47, sec 57.

In view of these English, Canadian, New Zealand, Australian, and French requisition provisions, and of the Uthwatt's Committee's proposals, it seems impossible to us to say that fairness or justice or reason ordains that the current war-inflated market price must be paid to an owner whose goods are taken by the state. These nations have had conceptions of eminent domain similar to ours, and they have been equally intent upon giving just compensation. High authority

[55] The second recommendation is highly relevant to the conception of the Merchant Marine Act, 1936, as revealing, in embryo, a "general federal shipping project" (*supra*, pp. 69–71), for it proposes the elimination of all enhancement due to "*possible* demands" for land by a government agency, or due to the "*existence of or proposals for, or the probability or possibility*" of any Governmental land development scheme. [Italics supplied.]

admonishes that examples such as these cannot be set aside in any judgment of the reasonableness or basic fairness of legislation. Holmes, J., dissenting in *Adkins* v. *Children's Hospital*, 261 U. S. 525, 570–1; Stone, J., dissenting in *Ribnik* v. *McBride*, 277 U. S. 350, 370–372; Stone, J., dissenting in *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 453–4; Brandeis, J., in *O'Gorman & Young, Inc.*, v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257–8; Hughes, C. J., in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 390–1, 399; Cardozo, J., in *Klein* v. *Maravelas*, 219 N. Y. 383, 386.[56]

c. It is true that application of the "enhancement" clause might well contravene the principle, broadly stated by the Court since the early 1920's, that just compensation "means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 304; *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Brooks-Scanlon Corp.* v.

[56] Cf. Mr. Justice Starke's comments (quoted in fn. 53, *supra*, pp. 72–73) pointing out that war enhancement clauses have been "common in Compensation Acts for many years" and are neither unreasonable nor unjust, and Mr. Justice Dixon's remark, *à propos* of the validity of an Australian compulsory-taking statute: "It will therefore be of some help, when the justice of the terms provided by Commonwealth legislation is in question, to see how other British legislatures have regarded the same matter." *Grace Brothers Proprietory Ltd.* v. *The Commonwealth* (1946) 72 CLR 269, 291; see *supra*, pp. 61–64.

United States, 265 U. S. 106, 126; *Phelps* v. *United States*, 274 U. S. 341, 344; *Olson* v. *United States*, 292 U. S. 246, 255; *United States* v. *Miller*, 317 U. S. 369, 373. But even with respect to judicial rules of just compensation, where Congress has not spoken, it has been cautioned that this principle is true only in the sense that the owner is to receive the value of the interest taken, whatever that may be. *United States* v. *General Motors Corp.*, 323 U. S. 373, 379. And, as Mr. Justice Rutledge recently noted (*United States* v. *John J. Felin & Co., Inc.*, 334 U. S. 624, 648), this principle is in conflict with the accepted rule against award of consequential damages (*United States* v. *General Motors Corp., supra* at 382; *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–2; *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378), including even the total destruction of a business. *Mitchell* v. *United States*, 267 U. S. 341; *Bothwell* v. *United States*, 254 U. S. 231.

Inconsistent as it is with important judicial rules of just compensation, the *Seaboard* principle should have still less significance when Congress has laid down the governing measure. In such a case, the appropriate principle, as we have argued, is supplied by the decisions reviewing state condemnations and gives much greater heed to the legislative judgment. *Supra*, pp. 55–57. Here, Congress had before it the documented history of shipping prices in World War I, and the

excessive awards required by the traditional rules of just compensation. *Supra*, pp. 25–38; *infra*, pp. 92–103. With this history in mind, it has in effect declared that the wartime ship owner should not be kept, upon requisition, in the same pecuniary position which the existing rules might allow him, because that exalted position rests on a gratuitous combination of scarcity of vessels with extreme and pressing need on the part of the warring world. Corollary theorems are, first, that the public should not be forced to bear the excess of price due to this combination, at great expense to itself and (in general) with a very large profit to the owner; and, secondly, that in these circumstances, it would not be unjust to pay the owner the price he could have gotten prior to the war shipping emergency, adjusted to reflect the price he would presumably have gotten after the emergency's end. These reasonable considerations are not very far, it seems to us, from those which moved Congress to require refunds of excessive profits by war contractors (Renegotiation Act, 56 Stat. 245, 982, 57 Stat. 347, 564, 58 Stat. 78, 59 Stat. 294), so that large and unfair burdens would not be imposed on the public, at the same time that individual contractors were piling up inordinate gains. Nor was Congress' mode of thinking on ship requisitions far from the prime purpose of the eminent domain power to enable the Government to secure necessary supplies, when it needs them, without compulsion to pay

undue amounts. I Bonbright, The Valuation of Property (1937) 408. Private parties, goaded by the probabilities of high profits, might well be willing to suffer excessive prices, but the theory of the Fifth Amendment is that the public, whose spur is less ponderable, should not be forced into that kind of competition.[57] Well within the basic motions delimiting the power of condemnation, Congress decided that it would not be unjust to shipowners to deprive them, at behest of the Government, of the peaks of the wartime shipping market. We submit that this legislative judgment should not be reversed by the Court.

d. Respondent intimates—and others have made the same claim—that Section 902 invalidly discriminates against shipowners, since the general wartime requisition statutes contain no enhancement clause (Br. in Opp. pp. 6–8) (Act of October 10, 1940, 54 Stat. 1090, Act of October 16, 1941, 55 Stat. 742; Second War Powers Act, Titles II, VI, 56 Stat. 177, 181). But "unlike the Fourteenth Amendment, the Fifth contains no equal

[57] It is hard to believe, for instance, that the Constitution would protect the increased prices of food-dealers after a calamity which destroyed a large part of a community's food supply, or in time of disaster would petrify the control over prices exercised by any group selling necessities. At the hearing before the first Advisory Board on Just Compensation, in November 1943 (fn. 3, *supra*, pp. 6–7), Judges Hand and Hutcheson presented such examples as indicating that the just compensation requirement was probably flexible, though they did not state a definitive opinion at that time. See *infra*, fn. 92, p. 124.

protection clause and it provides no guaranty against discriminatory legislation by Congress." *Detroit Bank* v. *United States*, 317 U. S. 325, 337–8, and cases cited; *Hirabayishi* v. *United States*, 320 U. S. 81, 100. Any legislative classification which is not so arbitrary as to deny due process is therefore valid, and the Due Process clause, as the Court has noted, imposes "restraints less narrow and confining" than the Equal Protection clause of the Fourteenth Amendment. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584.

In its requisition legislation, Congress singled out shipping because World War I experience demonstrated that this type of private property was at once the most necessary for war purposes and the most likely to skyrocket in price.[58] *Supra*, pp. 25–38; *infra*, pp. 92–103. Experience with land and other commodities had not appeared as devastating. "[A] statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see." *Keokee Consolidated Coke Co.*, v. *Taylor*, 234 U. S. 224, 227; *Hirabayishi* v. *United States*, 320 U. S. 81, 100; *United States* v. *Petrillo*, 332 U. S. 1, 8–9. "If a class is deemed to present a conspicuous example of what

[58] This foresight was amply confirmed by the actual experience of World War II. See Sherwood, Roosevelt and Hopkins (1948), *passim*.

the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law." *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160–1. As it has done here, the legislature may properly begin with the particular field which in its judgment most needs control.[59] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 471–2. Certainly, nothing prevents Congress from directing its legislation at one industry rather than another, or than all occupations or commodities, where it believes that the chosen industry needs special regulation—or, for that matter, special benefits.[60] *United States* v. *Petrillo*, 332 U. S. 1, 8–9; *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411; cf. *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584. A clear example, in a comparable legislative field, is the Renegotiation Act which

[59] Congress has often imposed special profit-limitations on the related shipbuilding industry. Section 505 (b) of the Merchant Marine Act, 1936, 49 Stat. 1985, 1998, limited profits on contracts for construction of subsidized vessels to 10%. During the defense and war periods, statutes restricted fees on cost-plus-fixed-fee shipbuilding contracts with the Maritime Commission to 7%. Act of May 2, 1941, 55 Stat. 148: Act of June 16, 1942, 56 Stat. 370.

[60] The "enhancement" clause of section 902 is but one part of a statute (the Merchant Marine Act, 1936) which confers upon the shipping industry many benefits, aids, and protections which have not been provided for other industries.

was limited to war contractors, because Congress believed that they were most likely to make excessive profits, although the concensus would now be that many non-war contractors, wholesalers, and retailers made over-generous profits, on account of war conditions, which were not siphoned off by the excess profits tax.[61]

3. *The "enhancement" clause and the war power.*—Authority to enact the "enhancement" clause of Section 902 flows not only from the Fifth Amendment and the general federal eminent domain power, but perhaps even more importantly from the Federal Government's war power, which vests Congress with full right "to protect the nation against war profiteering" (*United States* v. *Bethlehem Steel Corp,* 315 U. S. 289, 305, 309; *Lichter* v. *United States,* 334 U. S. 742, 754–769, 778–783), and permits extensive control over the lives, liberties, and properties of men, unknown to more normal times. *Lichter* v. *United States, supra; Bowles* v. *Willingham,* 321 U. S. 503, 517–519; cf. *Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 405–406. That power, which has amply sustained the Emergency Price Control Act (56 Stat. 23, 765) and the Renegotiation

[61] The established rules permitting the legislature to choose the evils to be remedied are fortified, in this instance, by the fact that Congress was apparently reluctant, at the time it adopted the general requisitioning acts, to make any change from the accepted judicial rules of just compensation, because of a fear that any alteration would be unconstitutional. *Supra,* pp. 37.

Act, provides a firm base for the similar legislative declaration that, in time of war or of a national defense emergency, *just* compensation does not include payment for an excess of value stemming from the nation's crisis.[82]

As *Lichter* points out, "in war both the raising and the support of the armed forces are essential. Both require mobilization and control under the authority of Congress," and, especially "with the advent of such [total global] warfare, mobilized property in the form of equipment and supplies became as essential as mobilized manpower." 334 U. S. at 754–755. One of the prime tools available for this mobilization of property is the Government war contract, and Congress—informed by the experience of World War I and the previous wars in which we have engaged—enacted a far-reaching system of supervision of war contractors' profits. The Court has now established that the war power authorizes this legislative control, even as to agreements antedating the passage of the Renegotiation Act. *Lichter* v. *United States*, 334 U. S. 742; *Lincoln Electric Co.* v. *Forrestal*, 334 U. S. 841. Another significant tool is the requisition power (334 U. S.

[82] Cf. *Coffman* v. *Federal Laboratories, Inc.*, C. A. 3d, No. 9545, decided November 9, 1948, upholding under the war power the provision of the Royalty Adjustment Act, 56 Stat. 1013, requiring the courts to take into "account the conditions of wartime production" in fixing "fair and just compensation" to be paid to a patent licensor for use of his invention on behalf of the United States.

at 754–756, 765; *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289, 309); and in the case of those most essential of war supplies, merchant ships, Congress—here, too, as a result of World War I experience—knew that the taking power would probably be essential to secure a sufficient pool of vessels for the country-at-war; accordingly, Congress took care, throughout the 1920's and 1930's, to provide the Government with dormant requisitioning authority. And just as the 1942 Congress knew that excessive profits would be made by war contractors if some control measure were not adopted, so the 1936 and 1939 Congresses foresaw that excessive prices would have to be paid, in time of war, for requisitioned ships, if the traditional rules applied in the last war were again followed. With precisely the same aim as it had in creating the renegotiation mechanism for war contracts, Congress adopted the "enhancement" clause for requisitioned ships. We can see no reason why the war power, so effective in the one instance, should be powerless in the companion. The rights of the property owner should be no more immune from the war power than the rights of producers or business organizations, or the lives of drafted men. 334 U. S. at 754–758, 779–782.

We may even assume that the "enhancement" clause imposed certain deprivations on shipowners. The same was true of war contractors, subject not only to renegotiation but to priority,

price-fixing, and allocation requirements. Cf. *Yakus* v. *United States*, 321 U. S. 414; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 405–6. It is in the nature of modern war that few can count confidently upon emerging unscathed. "In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself." 334 U. S. at 754.

4. *Foreign vessels:* Respondent is an American citizen and his vessel was requisitioned under Section 902 of the Merchant Marine Act, 1936 (R. 1, 5). His case can present no issue as to the application of the "enhancement" clause to *foreign-owned* vessels taken under the Act of June 6, 1941, 55 Stat. 242 (*supra*, pp. 36–37. *infra*, p. 135). Cf. *Skiriotes* v. *Florida*, 313 U. S. 69, 72–4. He has raised the point, however (Br. in Opp., pp. 17–19), and a substantial number of the just compensation suits now pending concern such vessels. In these circumstances, it may be well to sketch the Government's views on the matter.[23]

The 1941 statute empowered the President, during the period of the national emergency but not after June 30, 1942, "to purchase, requisition, for any period during such emergency charter, or requisition the use of, or take over the title to,

[23] The Comptroller General has ruled that the clause is applicable to takings of foreign vessels under the Act of June 6, 1941. 22 Comp. Gen. 1025 (May 11, 1943).

or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense: *Provided*, That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended * * *." In addition to the statutory and constitutional defenses raised by all shipowners, foreign and domestic, against effective application of the "enhancement" clause in judicial proceedings, the owners of foreign ships make two special claims: (i) that the "enhancement" clause is not a provision of Section 902 which is "applicable" to takings of their vessels, because it is said to violate recognized principles of international law, if construed as other than a restatement of traditional judicial just compensation rules, and (ii) the related defense that the clause should be read, in the case of foreign ships, so as to conform to these accepted international law principles. We can agree with neither claim.

a. The legislative history of the 1941 statute seems to us to require that the enhancement clause be given the same effect in requisitions of foreign vessels as it has for American ships. The House and Senate reports simply refer to Section 902 of the Merchant Marine Act as providing the

just compensation to which the foreign owners will be entitled. H. Rept. No. 440, 77th Cong., 1st sess., p. 7, S. Rept. No. 277, 77th Cong., 1st sess., H. Rept. No. 520, 77th Cong., 1st sess. (Conference report). In the Senate, Senator Bailey (Chairman of the Committee on Commerce) summarized Section 902 (a) (without mentioning the "enhancement" clause), quoted the proviso in the 1941 Act, and added; "So it must be said that there is the same provision respecting compensation upon taking the ship of a foreign citizen or foreign corporation in our waters as there is for taking the ships of our nationals. I do not think we would be expected to pay more to others than we pay to our own citizens, but I do think that we would be expected to pay to others what we pay to our own citizens." 87 Cong. Rec. 4027. And at the Senate Hearings, Senator Bailey and Admiral Land (Chairman of the Maritime Commission) agreed that Section 902 would be applicable, and that (in the Senator's words) "the American owners, or if we should pass this bill, the foreign owners, would not receive the extraordinary values which have been attached to ships on account of this war and the great many sinkings, but would receive the normal values." Hearings before the Senate Committee on Commerce, 77th Cong., 1st sess., on S. J. Res. 67 and H. R. 4466 (May 1941) p. 25. In the face of these explicit statements, no con-

trary inference can properly be drawn from the casual general statements on which the "enhancement" clause's opponents lean so heavily."[84]

The natural mode of reading the "just compensation" proviso of the 1941 Act conforms to this Congressional purpose. The "applicable" provisions of Section 902 are those dealing with just compensation for unsubsidized American vessels, as distinguished from the clauses, for instance, establishing measures of payment for ships upon which a construction-differential subsidy had been allowed (sec. 902 (b)), or subsection (e), regulating the use by the Maritime Commission of requisitioned vessels (R. pp. 132, 134). There is no occasion for finespun exegesis, cutting the "enhancement" clause out of the statute.

b. With so many nations of the world making use of war enhancement prohibitions in awarding compensation for domestic requisitioned property (*supra*, pp. 71–73), we strongly doubt

[84] The references are to paying "full value" of the ships, "what they are reasonably worth," "just compensation" or "reasonable price" (Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., 77th Cong., 1st sess. on H. R. 4088 and H. J. Res. 167 (April 1941), pp. 48, 54, 55); paying "the value in our port," paying "compensation for the use and for restoration of the ship to its condition" (Hearings before the Senate Committee on Commerce, *supra*, pp. 26, 114); making "full reimbursement of the value" of the requisitioned vessel (87 Cong. Rec. 4027); if the ships are bought, the Commission is "to pay for them what they are worth" (87 Cong. Rec. 4030).

whether Section 902's clause violates any present-day principles of just compensation in international law, whatever may have been the practice after World War I. But cf. Memorandum from the Department of State (dated April 16, 1943) quoted in 22 Comp. Gen. 1025, 1026–1030. The Report of the Second Advisory Board on Just Compensation (fn. 3, *supra*, 7; *infra* 142–9), "setting forth in particular the standards and principles to be observed in respect of the valuation of idle foreign merchant vessels requisitioned for title of use" under the 1941 Act embodied the interpretation of the "enhancement" clause which the first Board had adopted (*infra* pp. 142, 144–5), but concluded nevertheless that "these rules conform to the requirements of the Constitution of the United States and with the applicable standards of international law." (*Infra* p. 149.)

c. In any case, the purpose of Congress to equate the treatment of domestic and foreign shipowners seems plain,[65] and principles of international law cannot avail, in our principal tribunals, to overcome a conflicting statutory mandate. *The Cherokee Tobacco*, 11 Wall. 616; *Head Money Cases*, 112 U. S. 580, 597–599; *The Chinese Exclusion Case*, 130 U. S. 581, 600–1; *Fong Yue*

[65] It goes almost without saying that the "enhancement" clause in the 1936 Act, as amended in 1939, which applied only to American-owned vessels, need not be read with the requirements of international law in mind.

Ting v. *United States*, 149 U. S. 698, 720–1; *Hijo* v. *United States*, 194 U. S. 315, 324; *Pigeon River Improvement, Slide & Boom Co.*, v. *Cox Co.*, 291 U. S. 138, 160; cf. *Clark* v. *Allen*, 331 U. S. 503, 509.

III

THE TYPE AND MEASURE OF THE "ENHANCEMENT" EXCLUDED BY SECTION 902

Strenuous battle has raged since 1942 over the type and measure of the enhanced value excluded by the "enhancement" clause.[66] Three major interpretations have been advanced. One, that of the Comptroller General, is that the clause prohibits the payment of compensation to the extent that it may be based upon values in excess of those existing on September 8, 1939 (the date of the President's proclamation of a limited national emergency), provided that such excess be determined as due to economic conditions directly caused by the national emergency. 22 Comp. Gen. 497, 608. A second construction, announced by the Advisory Board on Just Compensation in December, 1943, and elaborated by the Second Advisory Board in 1945 (fn. 3, *supra*, p. 7) (Appendix B, *infra*, p. 136; Appendix C, *infra*, p. 142) defines the excluded enhanced value as that "due, to the Government's need of vessels which

[66] Since the Court of Claims held the clause inapplicable to its own proceedings, it did not canvass the various constructions, current and possible, of enhanced value to be eliminated.

has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect occurred before or after the declaration of the national emergency of May 27, 1941," but not including enhancement due to a general rise in prices or earnings of commodities or property, or of merchant vessels, if not due to the Government's need of vessels which necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, which is reasonably probable. The third interpretation—adopted by respondent (Br. in Opp., pp. 9–10) and by many shipowners—is that the clause does no more than incorporate, and goes no further than, the existing judicially developed doctrines of just compensation, especially as recently elaborated in *United States* v. *Miller*, 317 U. S. 369.[67]

[67] In brief, the early history of the controversy is as follows. The Presidential proclamation of an unlimited national emergency on May 27, 1941 (Proclamation 2487, 3 C. F. R., Cum. Supp., p. 234) made effective the requisitioning powers of Section 902, but large-scale requisitioning of American merchant ships did not begin until April 1942, with the War Shipping Administration as the requisitioning agency (fn. 2, *supra*, pp. 5–6). The Comptroller General formally announced his views on the "enhancement" clause in a letter of November 28, 1942. 22 Comp. Gen. 497. The War Shipping Administration strongly disagreed with these views, and (in December 1942) suspended payments under determinations of just compensation previously made, and ceased making new determinations, except to relieve hardship. This was later modified to permit partial payments which

To aid the Court in passing upon the substantive content of the "enhancement" clause, we shall first set out the pertinent legislative materials, then outline the practice of the War Shipping Administration and the putative operation of the Comptroller General's ruling, and finally collate the various arguments drawn from text, legislative history, Congressional purpose, and operations.

A. *Legislative indications of the content of the*

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would comply with the Comptroller General's ruling. The Comptroller General adhered to his views (22 Comp. Gen. 608), and the controversy between the War Shipping Administration and the Comptroller General continued into the spring of 1943; in June 1943 the Chairman of the House Merchant Marine and Fisheries Committee introduced a bill (H. R. 2731, 78th Cong., 1st sess.) for the purpose of developing the relevant facts and contentions. Public Hearings were held [Hearings before the Committee on the Merchant Marine and Fisheries, H. of Reps., 78th Cong., 1st sess. on H. R. 2731 ("Just Compensation for Requisitioned Vessels")], and the committee had the matter under consideration when Executive Order 9387, appointing the Advisory Board, was issued on October 15, 1943 (fn. 3, *supra*, p. 6). Legislative proposals were thereupon dropped. 89 Cong. Rec. A4957–9. By the Executive Order, the Administrator was required to follow the Board's report of December 7, 1943. For the later history of the controversy, see *infra*, pp. 104–5, 111–13.

Many of the documents in the controversy, compiled by the War Shipping Administration, are reprinted in the so-called Document 20 (and its supplements) ("Compilation of Material On the Determination and Payment of Just Compensation for Vessels Requisitioned under Section 902 of the Merchant Marine Act, 1936") printed by the Committee on Merchant Marine and Fisheries, H. of Reps., 78th and 79th Congresses.

"enhancement" clause.—1. The brief history of the "enhancement" provision which we included in Point I (*supra*, pp. 25–38) leaves no doubt that the clause's prime purpose was to permit vessels to be taken at less than war or emergency prices, such as those paid during World War I. The 1916 Shipping Act's qualification that the "fair actual value" paid for the vessels requisitioned under that statute must be "based upon normal conditions" was an early recognition—before the United States entered the conflict—of the runaway ship prices modern war brings. When the United States did come to acquire vessels in the first World War, the prices that were paid, both in purchases and on takings, were extremely high, as Congress was acutely aware at all times during the two decades between the wars. For instance, the report of the House Select Committee of Inquiry into Operations, Policies, and Affairs of the United States Shipping Board Merchant Fleet Corporation, appointed by the 68th Congress, gives examples of the enormous "war-time prices" and refers to "fabulous prices" paid even for obsolete vessels. H. Rept. No. 2, 69th Cong., 1st sess., pp. 31–32 (1925).[68] From 1922 to 1941, Congressional dis-

[68] Some idea of the amounts required to be paid by the United States for title or use of vessels taken in World War I, and of the governing factors judicially applied under statutes which provided merely for the payment of just compensation, may be gathered from a series of Court of Claims ship requisition cases. *Use requisitions: Hudson*

cussions of relevant merchant marine legislation refer consistently to the need for avoiding the bulging prices of World War I in times of new

Navigation Co. v. *United States*, 57 C. Cls. 411 (1922) (Hudson river liner; Navy determined just compensation at $8,000 per month, bareboat charter; court determined it to be $12,000 per month, expressly taking account of wartime enhancement); *Gulf Refining Co.* v. *United States*, 58 C. Cls. 559 (1923) (six tankers; Shipping Board just compensation rate for bareboat hire (accepted by great majority of owners) was $4.15 per deadweight ton per month; court held it to be $6.60, again expressly including wartime enhancement); *Standard Transportation Co.* v. *United States*, 61 C. Cls. 906 (1926), certiorari denied, 273 U. S. 732 (same); *Standard Oil Company* v. *United States*, 61 C. Cls. 951 (1926) (same); *Atlantic Refining Co.* v. *United States*, 72 C. Cls. 1, 21, 26 (1931), certiorari denied, 285 U. S. 542 (same); cf. *Huron Navigation Corp.* v. *United States*, 60 C. Cls. 770, 790, 802, 806 (1925), appeal dismissed by stipulation, 273 U. S. 778. *Requisitions of title or of ship construction contract: Consorzio Veneziano* v. *United States*, 64 C. Cls. 11 (1927); *John M. Connelly S. S. Co.* v. *United States*, 64 C. Cls. 38 (1927); *Luckenbach S. S. Co.* v. *United States*, 64 C. Cls. 59, 78–9 (1927), certiorari denied, 277 U. S. 584; *Brooks-Scanlon Corp.* v. *United States*, 64 C. Cls. 80 (1927); *Ocean S. S. Co.* v. *United States*, 64 C. Cls. 98 (1927), certiorari denied, 277 U. S. 584; *Compagnie Generale Transatlantique* v. *United States*, 64 C. Cls. 119 (1927), certiorari denied, 277 U. S. 585; *DeLuca* v. *United States*, 84 C. Cls. 217, 244–247 (1936); see, also, *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 125 (1924).

World War I eminent domain cases, involving other types of property, likewise awarded high wartime prices. *E. g.*, *United States* v. *New River Collieries*, 262 U. S. 341 (coal); *Davis* v. *Newton Coal Co.*, 267 U. S. 292 (coal); *National City Bank* v. *United States*, 275 Fed. 855 (S. D. N. Y.), affirmed, 281 Fed. 754 (C. C. A. 2) (coffee); *C. G. Blake Co.* v. *United States*, 275 Fed. 861 (S. D. Ohio), affirmed, 279 Fed. 71 (C. C. A. 6) (coal); *Prince Line* v. *United States*, 283 Fed. 535 (E. D. N. Y.) (Bush Terminal pier lease). Cf. Orgel,

necessity.[89] And it is common knowledge that, ever since the end of the first war, Congress has been strongly concerned about the high prices charged the Government for all war supplies, the large profits made on munitions or equipment furnished to the nation, and the large awards which were made for commandeered property. See, *e. g.*, the studies of the War Policies Commission, H. Docs. 163, 271, 72d Cong., 1st sess. (1931–2), especially No. 271, pp. 23–25 (high awards for commandeered property); the reports of the Special Senate Committee on Investigation of the Munitions Industry pursuant to S. Res. 206 of the 73d Cong., S. Rept. Nos. 577 and 944 (1935–6), 74th Cong., especially pt. 2 of No. 944, pp. 3, 111–113 (high awards for requisitioned property); Hearings before the Committee on Military Affairs, H. of Reps., 68th Cong., 1st sess. on H. J. Res. 128, H. R. 194, H. R. 4841 and H. R. 8111 (March 1924) ("Universal Mobilization for War Purposes"); and Hearings before the Committee on Military Affairs, H. of Reps., 74th Cong., 1st sess. on H. R. 3 and H. R. 5293 (January 1935) ("Taking the Profits Out of War").

2. In addition to this pervading and significant

Valuation Under the Law of Eminent Domain (1936), Sec. 25 ("War-Time Prices"); Note (1940) 40 Col. L. Rev. 1390, 1401–2; 54 Harv. L. Rev. 278, 303–4; 50 Yale L. J. 250, 277–9.

[89] See, *e. g.*, 63 Cong. Rec. 367–8; 69 Cong. Rec. 7916–7; 79 Cong. Rec. 10200; 80 Cong. Rec. 9920–1; 84 Cong. Rec. 10626; Hearings before the Senate Committee on Commerce, 77th Cong., 1st sess. on S. J. Res. 67 and H. R. 4466, p. 25.

general purpose, some more specific inklings of Congressional understanding of the effect and operation of the "enhancement" clause are available. When the "enhancement" clause, in the terms in which we now have it, first appeared in 1922, the House Committee on Merchant Marine and Fisheries characterized it as insuring "a fair price, and such fair price is to be based upon a fair actual value of the vessel without inflation, due to the causes which necessitated the taking." H. Rept. No. 1112, 67th Cong., 2d Sess., at p. 29. In the course of debate on the unsuccessful measure, Representative Edmonds, supporting the limitation, indicated that it would cut down the taking price substantially below the value accruing when the "war comes on." 63 Cong. Rec. 97. Mr. Davis of Tennessee (an opponent of the bill), however, futilely sought to amend the bill to require the payment of no more than actual cost less depreciation, apparently believing that the "enhancement" clause, by itself, would not be sufficiently effective to abolish payment of war-inflated prices. 63 Cong. Rec. 367–8.[70] On the other hand, in 1928, in the debate on the Merchant Marine Act of that year which incorporated the "enhancement" clause, Mr. Davis (then a supporter of the measure, and a member of the conference committee) supported the limitation as excluding

[70] Mr. Davis' proposal was very similar to that which was later incorporated in Section 802 of the Merchant Marine Act, 1936 (*infra*, p. 129) with respect to subsidized vessels.

"any enhancement because of the emergency," and specifically contrasted requisition "under the general law," as in World War I, where the United States was "required to pay the market value at the time of taking, which in numerous instances was many fold what the ship was worth in peace times." 69 Cong. Rec. 7916–7.[71]

3. As we have pointed out (*supra*, p. 28), the clause was carried over intact in the new merchant marine bills considered by the Congress in 1935 and 1936. During the House consideration of the taking provisions of the measure (then restricted to Government-aided vessels), Congressman Moran successfully proposed an amendment, retaining the "enhancement" provision but limiting awards to no more than the vessel's cost less depreciation. In his view, the "enhancement" clause would not properly operate to eliminate enhancement occurring before the United States entered a war (as during 1914–1917), and a more severe formula was needed.

[71] In 1925, the Select Committee of Inquiry into the Operations, Policies and Affairs of the United States Shipping Board Merchant Fleet Corporation had recommended that the requisition provisions of the Shipping Act of 1916 (*supra*, p. 25) (the only then existing requisition statute) be amended "so as to clearly and specifically provide that in the event of a future national emergency and the need for such [Shipping Board] ships for national defense, the Government could take them over on the basis of charter rates prevailing before the emergency arose, or at the world market value of such ships before the emergency arose." H. Rept. No. 2, 69th Cong., 1st sess., p. 25.

79 Cong. Rec. 10200.[72] (The amendment which he proposed found its way into Section 802 of the Act, governing the taking of subsidized vessels. *Infra*, p. 129.) Authority to requisition unsubsidized ships was added by the Senate (*supra*, p. 20); but the debate in that body concerned mainly the provisions for paying owners of *subsidized* vessels, and reveals little more than that the Senate agreed with the House that a cost maximum should limit awards in the latter case. 80 Cong. Rec. 9920–21, 10077.[73]

At the time the 1939 amendments to Section 902 were being considered (*supra*, pp. 33–35), the American Merchant Marine Institute, representing the large majority of American shipowners, requested the House Committee to amend the "enhancement" clause so that the value of the property taken or used would not be deemed enhanced by the *immediate* causes necessitating the taking or use; the Institute intended this amendment to confine the excluded enhancement to that occurring during an actual war. (Hearings before the

[72] Mr. Moran adhered to this view of the "enhancement" clause after he became a member of the Maritime Commission, stating, in 1940, that the clause "does not protect against price raises caused by the general conditions leading to an emergency before the actual emergency arises, as experienced in the year 1914–17."

[73] Senator Bone, who insisted on the cost maximum provision, did not refer to the "enhancement" clause at all, though he did criticize the taking provisions in general, and particularly the payment of "fair actual value" for subsidized ships. 80 Cong. Rec. 9920–21.

Committee on Merchant Marine and Fisheries, H. of Reps., 76th Cong., 1st Sess. on H. R. 4983, April 27, 1939, pp. 15–16.) The Committees and the Congress did not adopt this suggestion but retained the previous wording. In a very short discussion of the Committee's own proposal, Senator Bailey, Chairman of the Committee on Commerce, told the Senate that, as amended, the statute requires the valuation for a taking award "not be on any enhanced value due to the emergency, but on the value prior to the emergency." 84 Cong. Rec. 10626–10627. There was no relevant debate in the House. 84 Cong. Rec. 6105.[74]

4. a. This twenty-five year course of Congressional concern with ship requisitions and with enhancement leaves no doubt of the plain purpose to prevent a repetition of the World War I experience. Congress openly desired, if it could, to prevent requisition awards as large as those allowed by the courts, or even as high

[74] The Act of June 6, 1941, 55 Stat. 242, Public Law No. 101, 77th Cong., (*infra*, p. 135), which authorized the taking of foreign merchant vessels lying idle in our waters, provided for the determination and payment of just compensation "in accordance with the applicable provisions of section 902." The single reference to the content and effect of the "enhancement" clause was the agreement of Senator Bailey and Admiral Land, at the Senate hearings, that under Section 902 the shipowners, foreign or domestic, "would not receive the extraordinary values which have been attached to ships on account of this war and the great many sinkings, but would receive the normal values." Hearings before the Senate Committee on Commerce, 77th Cong., 1st Sess. on S. J. Res. 67 and H. R. 4466 (May 1941), p. 25.

as the prices voluntarily paid by the Shipping Board. The "enhancement" clause was regarded as the primary mechanism for accomplishing this aim of placing a reasonable ceiling upon the amounts the Government would have to pay for vessels in time of a new war or national emergency. Until 1936, the clause applied only to takings of government-aided or previously-government-owned vessels, but when it was extended to unsubsidized ships by the Merchant Marine Act of 1936, there was no hint of a suggestion of any change in the basic purpose to limit the prices of ships taken by the United States. *Supra,* pp. 28–30, 97–98. Rather, the same fundamental goal has been reiterated whenever Congress has had to deal, since 1936, with the requisition of ships for national defense or war ends. *Supra,* pp. 33–38, 98–99. It follows that, in Congress' eyes, the clause was decidedly more than a restatement of the judicially-developed standards of just compensation which had governed in previous ship-taking cases; and it is noteworthy that, before requisitions under Section 902 commenced in 1941 and 1942, shipowners seemed to be of precisely the same view. See the statement of John J. Burns, representing the American Merchant Marine Institute, at the hearings on the 1939 Amendments to Section 902, quoted *supra,* at p. 34. (Hearings before the Committee on Merchant Marine and Fisheries, H. Reps. 76th

Cong., 1st Sess., on H. R. 4983, April 27, 1939, pp. 15–16.)

b. The legislative history we have set forth is less clear as to the precise extent and confines of the limits Congress wished to impose upon the awards to be made for requisitioned vessels. Little attention was given to the actual words of the clause—"in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use"—or to their explication. But certainly there is warrant for saying that the aim was to pay for the ships at their peacetime values, at the prices current in the normal market before the emergency arose. It is less clear what "emergency" Congress had in mind—this country's own emergency or need for ships, or the emergency or shipping needs of other nations at war, which would naturally be reflected in rising market prices for American vessels. Some references to the increase of prices from 1914 to 1917, before the United States entered World War I, suggest that certain proponents of limiting the prices to be paid for requisitioned tonnage viewed the "enhancement" clause as ineffective to cut down values occurring during a war period prior to our entry into the conflict. *Supra*, pp. 96–98. On the other hand, Congress well knew that ship prices rose steeply from 1914 to 1917, because of

the European War,[25] and it is highly improbable that it meant the "enhancement" clause to take no account of the value-inflation which would occur during a similar period of tension or extra-American conflict, occurring prior to our becoming involved in the struggle. At least at the time of the 1939 amendment, it would not have appeared too remote that, if another World War were to come, the United States would enter the struggle, if at all, only after some months or years of official non-participation. And it was the 1939 Congress which refused to adopt the Merchant Marine Institute's suggestion that excluded enhancement be limited to that due to the "immediate" causes necessitating the taking. *Supra*, pp. 98–99.

c. As we sum it up, the conviction may surely be drawn from the clause's history that Congress meant to bar recovery of amounts comparable to those secured for ships in World War I, and to that extent desired to discard the doctrine that current-market-value-at-the-time-of-taking determines just compensation. Less surely, but still with a fair degree of conviction, we conclude that Congress desired to exclude at least some enhancement occurring during a definite period of

[25] This rise was already clear when Congress enacted Section 10 of the Shipping Act of 1916, with its emphasis on fair actual value "based upon normal conditions." *Supra*, pp. 25–26.

tension prior to the actual engagement of this country in war. The legislative record seems still less clear as to actual starting point of the enhancement Congress intended to be eliminated or, in alternative words, the exact "causes necessitating the taking" which lay in the mind of Congress.

5. Since the controversy over the meaning of the "enhancement" clause first became acute late in 1942, Congress has, at different times, taken action which can be construed as confirmation of both the Advisory Board's views and those of the Comptroller General. The National War Agencies Appropriations Act, 1946, Act of July 17, 1945, 59 Stat. 473, 480 made funds available for "carrying on all the activities and functions of the War Shipping Administration as prescribed" in designated Executive Orders, including Order No. 9387, establishing the Advisory Board on Just Compensation and requiring the Administration to follow its rules (*supra*, fn. 3, p. 6). The designation of specific Executive Orders was a change from the previous appropriation act which referred only to authority and functions "heretofore or hereafter lawfully vested in such Administration" (National War Agency Appropriation Act, 1945, Act of June 28, 1944, 58 Stat. 533, 542), and the specific reference was openly designed by its administrative sponsors to give legislative sanction to the provisions of the stated Orders. Hearings before the Subcommittee of the Com-

mittee on Appropriations, H. of Reps., 79th Cong., 1st Sess. on the National War Agencies Appropriations Bill for 1946, pp. 459–461. Similar designation of Executive Order No. 9387 appears in the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 Stat. 481, 499–500, 501.

On the other hand, in its Second Supplemental Appropriation Act, 1948 (Public Law No. 299, c. 414, Act of July 31, 1947), the 80th Congress appears to have confirmed the Comptroller General's ruling. That statute transferred the War Shipping Administration's unexpended balances from the Maritime Commission (which had received them by Section 202 of the Naval Appropriation Act, 1947, 60 Stat. 501, *supra*, fn. 2, pp. 5–6) to the Treasury, and authorized the Secretary of the Treasury "to liquidate such obligations as may be found by the General Accounting Office as having been properly incurred against such funds prior to January 1, 1947." In connection with this provision, the House Appropriations Committee referred to the outstanding claims for just compensation for vessels requisitioned under Section 902 (a), and stated: "The Comptroller General rendered a decision interpreting certain phases of this section early in the War, but the Commission so far has failed to consummate the settlements. These payments bear interest from the date of requisition of a vessel until the date of settlement, and it is the committee's desire that

these claims be processed with all practicable speed and with due regard to the decision of the Comptroller General." H. Rept. No. 1053, 80th Cong., 1st Sess., p. 3. During debate, Chairman Taber called this statement in the report to the attention of the House. 93 Cong. Rec. 10046 (July 24, 1947, daily ed.).[76] Perhaps the 80th Congress' confirmation of the Comptroller General's "enhancement" decisions is somewhat more explicit than the 79th Congress' approval of the views of the Advisory Board.

B. WAR SHIPPING ADMINISTRATION'S APPLICATION OF THE ADVISORY BOARD'S RULES; OPERATION OF THE COMPTROLLER GENERAL'S "ENHANCEMENT" DECISIONS

In general, at the outbreak of the Second World War in September 1939, values of the larger American ships and charter rates were quite low, compared to the level attained in the succeeding period. Between September 1939 and May 27, 1941 (the date of the President's proclamation of unlimited emergency) there was a steep rise in

[76] In deference to these legislative views, the Maritime Commission has adopted the policy of determining the remaining awards for requisitioned vessels on the basis of the Comptroller General's decisions, although a majority of the Commissioners (in January 1948) expressed themselves as believing that the Advisory Board's rules constitute the proper measure. The Comptroller General has stated that, in general, he will accept the Commission's certification that, in its opinion, the award is consistent with the applicable decisions of the General Accounting Office. B-30613, B-69148, October 13, 1947.

market values of ships as well as of charter rates. Toward the end of 1941, these prices and rates began to fall and by the time the full scale requisitioning program commenced in April 1942, the market values of ocean going vessels were lower than they had been in May 1941, but still substantially higher than the 1939 levels. See testimony of Admiral Land at Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., on H. R. 2731 (June 10, 1943), pp. 5–8; cf. Rule 4 of the Rules of the Advisory Board on Just Compensation, *infra*, pp. 139–140.[77] It is in this general practical context that adminis-

[77] The Act of July 14, 1941, c. 297, 55 Stat. 591 (the so-called Ship-Warrant-Law—"An act to provide for priorities in transportation by merchant vessels in the interests of national defense, and for other purposes") authorized the President, through the Maritime Commission, to issue warrants to domestic and foreign vessels during the national emergency. Section 1. Vessels holding warrants were to secure priority over non-warrant-holders "with respect to the use of facilities for loading, discharging, lighterage or storage of cargoes, to procurement of bunker fuel or coal, and the towing, overhauling, drydocking or repair of such vessels." Section 3. Warrants were to contain conditions to be set by the Commission, "with respect to the trades in which such vessel shall be employed, the voyages which it shall undertake, the class or classes of cargo or passengers to be carried, *the fair and reasonable maximum rate of charter-hire or equivalent*, and such incidental and supplementary matters as appear to the United States Maritime Commission to be necessary or expedient for the purposes of the warrant." Section 2.

Admiral Land has stated that the Commission and, later, the War Shipping Administration, used their authority, under this Act, to fix the "fair and reasonable maximum rate

trative awards of just compensation had to be made.[77]

1. *War Shipping Administration's application of the Advisory Board's rules.*—Executive Orders 9387 and 9614 (fn. 3, *supra*) required the War Shipping Administration to be guided by the rules established by the Advisory Board, and after December 1943 the Administration pur-

of charter-hire" for warranted ships at levels which would reduce the existing market rates from their "exorbitantly high" peaks. He also reported that full-scale requisitioning was delayed for some time after the proclamation of the unlimited emergency in May 27, 1941 until the administrative efforts to cut down existing rates and values, by voluntary agreement as well as through the ship-warrant device, had produced some favorable results. Hearings before the Committee on Merchant Marine and Fisheries, H. of Reps., on H. R. 2731 (June 10, 1943) pp. 5–8.

[78] The following table gives the average of ship sales, from 1939 to 1942, for dry-cargo vessels ranging between 7,000 and 12,000 tons deadweight and from 20 to 25 years old. This class of vessels, we understand, constituted the heart of the War Shipping Administration's requisition program:

Year	Quarter	Average price (per dwt. ton)
1939	First	$12.50
1939	Second	10.49
1939	Third	12.94
1939	Fourth	21.08
1940	First	42.03
1940	Second	54.91
1940	Third	48.62
1940	Fourth	49.98
1941	First	63.77
1941	Second	84.39
1941	Third	No sales
1941	Fourth	80.62
1942	All	45.44

(This information has been supplied by the Maritime Commission, which compiled the table from reports of the

ported to follow those rules in making awards in this (R. 11) and other cases. With regard to ocean-going merchant vessels, the Administration found that the enhancement in ship values excluded by Section 902 (a), as construed by Rule 4 of its Advisory Board,[79] commenced in general to accrue in the opening weeks of 1941, which may be symbolized as the time when the Lend-Lease Act (Act of March 11, 1941, 55 Stat. 31) was under consideration. In making its awards for such vessels, the Administration generally disallowed increases in ship values occurring after that period, to the extent that these increases exceeded the general rise in prices or earnings. (For other types of vessels, no similar general formula of enhancement was established.) On the basis of this general finding, the Admin-

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Division of Economics and Statistics of the War Shipping Administration. It should be added that no accurate information is available concerning the state of repair of the vessels sold, and that it is therefore possible that some additional conditioning expenditure would have been necessary to place the vessels in sound condition.)

See also Appendix E (separately printed) for a chart of vessel prices from July 1937 to December 1940 (supplied from the files of the War Shipping Administration).

[79] Under Rule 4, the excluded or deducted enhancement consisted of that "due to the government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941," but "Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted". *Infra*, p. 139.

istrator fixed general charter rates for the use of ocean-going vessels, other than passenger ships and certain specialized types of vessels.[80] War Shipping Administration General Order No. 37, 9 Fed. Reg. 3806, 46 C. F. R., 1944 Supp., 302.101–302.113. The basic bareboat rate was fixed at $1 per dead-weight ton per month for colliers, $1.15 per dead-weight ton per month for tankers, and $1.25 per dead-weight ton per month for freighters constructed prior to 1934. These rates the War Shipping Administration has compared with the bareboat charter rate of $4.15 allowed by the Shipping Board in World War I, and the $6.60 rate awarded by the Court of Claims after the last war (see fn. 68, *supra*, p. 93). See also, Smith, *Influence of the Great War Upon Shipping* (1919), p. 199. General Order 37 established a basic value for tankers and dry cargo ships built prior to 1934—requisitioned for title—of $56.25 per dead-weight ton, which was to be reduced to approximately $47 in April 1945, but which was to be increased (by sums ranging from $8 per ton to $53 per ton) for tankers built in the United States during the period 1929–1934.[81]

[80] Most of the ocean-going fleet (over 1000 vessels) was requisitioned for use, under Section 902, rather than for title. The smaller crafts (over 2500 vessels) (including tugs, barges, yachts, special vessels) were mainly requisitioned for title, as was respondent's vessel.

[81] General Order 37 describes these ton-values as "with respect to risks insured or assumed of the War Shipping Administration," but the same values were used in awarding

The Administration has contrasted these values with the World War I Shipping Board basic value of $165 per dead-weight ton.

Awards made or charters given under the provisions of General Order 37 were accepted by the large majority of owners subject to its provisions. The Report of the second Advisory Board on Just Compensation (October 26, 1945) stated that the order "seems to have been remarkably effective in bringing about satisfactory adjustments with American owners pursuant to the rules announced previously by the Board." *Infra*, p. 143. The Comptroller General has indicated that a preliminary survey leads him "to believe that rates and valuations fixed in accordance with the formulae contained in W. S. A. General Order 37 may be substantially in excess of the amounts properly payable if due regard were given to the decision of November 28, 1942, 22 Comp. Gen. 497" (letter of October 13, 1947 to Chairman, U. S. Maritime Commission, B–30613, B–69148), and there is considerable controversy as to whether General Order 37 was a sound or correct application of the first Advisory Board's rules.

2. *Comptroller General's view.*—The Comptroller General has ruled that "the enhancement clause in said section 902 (a) prohibits the payment of compensation for such [requisitioned]

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compensation for requisitions of title. See, also, Section 902 (c), *infra*, pp. 133–4; fn. 6, *supra*, p. 21, and Rule 7 of the Rules of the first Advisory Board, *infra*, p. 140.

vessels to the extent that it may be based upon values in excess of the values existing on September 8, 1939 [the date of the President's proclamation of a limited national emergency], provided such excess be determined as due to economic conditions directly caused by the national emergency." 22 Comp. Gen. 497, at 501; 22 Comp. Gen. 608. The proviso permits some enhancement over the September 1939 values, as the Comptroller General has recently reaffirmed in a letter to the Maritime Commission (February 6, 1948; B–30613, B–69148): "As you probably are aware, this Office never has held that the effect of section 902 (a) was to place an absolute maximum valuation equivalent to values on September 8, 1939, upon vessels requisitioned under said section. Permissible enhancement over and above the valuation on that date was recognized in the original decision of November 28, 1942 [22 Comp. Gen. 497], and in later decisions. In that connection, the Advisory Board on Just Compensation correctly construed said decision of November 28, 1942, in its letter of December 7, 1943, to Admiral Land, when it said [*infra*, pp. 136–7]:

> "'Contrary to the impression existing in many quarters, the Comptroller General does not limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the de-

> termination of values. The necessity of allowing subsequent enhancement that is not 'directly' caused by economic conditions resulting from the emergency is specifically recognized by him.'"

Only recently have administrative awards for requisitioned vessels been calculated on the Comptroller General's interpretation of the "enhancement" clause. *Supra*, p. 105, fn. 76. It is our understanding that the Comptroller General has indicated that he will not object to an increase of approximately 5% to 33%, (depending on the date of requisition), over September 1939 ship values as representing enhancement not directly caused by economic conditions resulting from the emergency.[82] In an informal interoffice memorandum (dated November 3, 1948) the Comptroller General has said, concerning this increment:

> It is only fair and just that the Government should pay the amount so computed ["*i. e.* an increment representing the actual increases in the labor and material costs involved in building ships"] since it may be regarded as constituting, in effect,

[82] This rise represents the estimated rise in shipbuilding costs for cargo vessels and tankers over the period from 1939 to 1945; the graph indicating the fluctuations in the rise is sometimes called the Vickery scale, after the late member of the Maritime Commission. For the year 1943, the rise of about 30% on this scale compares with an increase of about 39% in the wholesale prices of all commodities from 1939 to 1943, and about 40% in the prices of producers' goods. Appendix F (separately printed) contains a graphic portrayal of the Vickery scale.

actual out-of-pocket loss by the owner due to the taking of his property. It is not fair that the Government should pay more, since the owner then would be taking advantage of the necessitous circumstances of his country in time of national emergency. And that is the very evil the prohibition was designed to correct. It may be presumed that the so-called Vickery Scale was worked out by persons familiar with shipbuilding costs and that it accurately reflects price trends. Accordingly, if the base valuation—that is, the value of the vessel on September 8, 1939,—appears, on the evidence at hand, to be reasonable, there may be accepted as proper under the statute a final valuation based upon the application of the scale, in the absence of evidence to indicate that it is inaccurate and excessive, and if it is supported by the certification required by B-30613, B-69148, October 13, 1947.

We also understand that the Comptroller General has indicated that he has no objection to the administrative awards which have been made for smaller vessels, under 1,000 tons, such as respondent's tug, since the War Shipping Administration certified that in the case of yachts, tugs, and fishing vessels, its awards did not exceed those payable under the Comptroller's decisions.

C. CONSIDERATION OF THE VARIOUS INTERPRETATIONS

1. At the outset of the difficult task of marking even tentative boundaries for the "enhancement"

clause's application, we may repeat our emphatic rejection of the view—held by the lower court (R. 16–17), by respondent (Br. in Op., pp. 9–10) and by other claimants—that the clause merely incorporates existing just compensation doctrine, in particular the rules that no consideration should be given to the taker's special need for the property or the owner's unwillingness to sell, as they have thus far been applied. *Supra*, pp. 99–101. The Act's legislative history is squarely against this view; Congress desired to restrict awards to levels much less than those allowed in decisions after the first war which applied the conventional rules.[83] Congress plainly did not want ship awards to be made at inflated wartime market prices, but those (like respondent) who propose this construction of the clause obviously aim to secure precisely those inflated values and it is clear that, on their view, the clause would be totally ineffective to attain the purpose of Congress. The addition of a superfluous sentence at the end of Section 902 (a), barring consequential damages, does not prove that Congress designed the "enhancement" clause to be equally unnecessary; and the history of the clause does affirmatively prove the opposite.[84]

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[83] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 76, the classic decision on exclusion of the taker's special need, was decided in 1913. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, and *United States* v. *New River Collieries Co.*, 262 U. S. 341, were decided in 1923.

[84] The sentence relating to "consequential damages", was

Secondly, it is appropriate to note that there may be no necessary conflict between the results attained under the Comptroller General's view and that of the Advisory Board, though it is plain that the points of approach differ. The former begins with September 1939 values and permits an increment computed according to the Vickery Scale; the latter starts with current market value at the date of taking and requires the deduction of excluded enhancement. In the letter transmitting its report, the first Advisory Board said (*infra*, p. 137):

> It is conceivable that, in application the difference might turn out to be far less than has at times been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

2. In the historical and philosophic sense, there is, of course, an endless chain of "causes necessitating the taking" of a particular vessel. With omission of some intervening steps, and emphasis on relatively direct "causes," there might be said to be, (i), first, the special need for the precise ship (*e. g.*, a tug for use on the Eastern Sea Frontier as a steam heating plant) (R. 9); (ii), the Government's need for this class of vessels in that locality (*e. g.*, tugs in New York); (iii), the Government's need for vessels of that type

carried over from the requisition provisions of the 1928 Merchant Marine Act. See fn. 14, *supra*, pp. 30–31.

(*e. g.*, tugs); (iv), the Government's need to purchase, take or charter merchant vessels to carry on war or defense activities; (v), the Government's wider general need for vessels, in private hands as well as its own, to carry on its war or defense activities; (vi), the national defense or war conditions, pertinent to American security, which brought about the need to take these active steps; (vii), the national or international conditions which led to these national defense or war causes—and so on, back into history. The evident purpose of Congress, on which we have laid great stress, to restrict the prices to be awarded for taken vessels below that payable under the pre-existing judicial rules of just compensation requires the rejection of such "immediate" causes as (i), (ii), and (iii), as the sole statutory "causes necessitating the taking"; the exclusion of enhancement due to these causes would not be effective to reduce awards made under the conventional rules of just compensation. But choice among the less immediate "causes" is hardly as plain.

3. a. The Comptroller General's reasons for adopting the date of September 8, 1939, may be summarized as follows (22 Comp. Gen. 497, 608, 877):[35] (a) By the "enhancement" clause Congress intended that compensation for a vessel

[35] While he was Representative from North Carolina, Comptroller General Warren served on the House Merchant Marine and Fisheries Committee, in the 74th, 75th, and 76th Congresses (1936–1940).

which had been requisitioned "under the stress of danger to the national security" should be measured by standards prevailing at a time when the factors which usually exist during such a period of danger were not operative to enhance the value of vessels (p. 500); (b) war, or the threat of war, produces a tremendous inflation of commodity prices, particularly of vessels (p. 500); (c) the "causes that necessitate the taking or use" of a private vessel by the Government, under Section 902, are "the prevalence of a danger or threat to the nation" (p. 501); (d) a certain and fixed date is necessary to mark the beginning of the period of excluded enhancement, in order to give effect to the intent of Congress (p. 501, 610); (e) excluded enhancement can begin to accrue before the power to requisition under Section 902 comes into effect (p. 610); (f) even though the requisitioning power may not have become operative until the proclamation of unlimited emergency in May, 1941, the earlier presidential proclamation of September 1939 announcing a national emergency for certain stated purposes marks the beginning of the period of prevalance of danger or of threat to the nation; during which no permissible enhancement can accrue (pp. 501, 610); (g) the appropriateness of this date is attested by the sharp rise in ship values thereafter (p. 610), and to choose the date of the later proclamation (May 1941) would "practically nullify the effect of the enhancement

clause" (p. 610); (h) permissible enhancement over September 1939 values is allowable if it is not "due to economic conditions directly caused by the national emergency" (p. 501).[86]

[86] The Comptroller General's first decision (22 Comp. Gen. 497, November 28, 1942) appeared to assume that the proclamation of September 8, 1939 (3 C. F. R., Cum. Supp., p. 214; 3 C. F. R., 1939 Supp., p. 59) was sufficient to authorize the requisitioning of ships under Section 902, and that that fact was of importance in determining the beginning of the period of excluded enhancement. 22 Comp. Gen. at 501. The War Shipping Administrator then pointed out that, in the view of the Maritime Commission and of the interested Congressional committees, the power did not come into operation until the proclamation of an unlimited emergency on May 27, 1941. It was pointed out that the first proclamation (entitled "Proclaiming a National Emergency in connection with the Observance, Safeguarding, and Enforcement of Neutrality and the Strengthening of the National Defense within the Limits of Peace-time Authorizations") stated that "measures required at this time call for the exercise of only a limited number of the powers granted in a national emergency," proclaimed only "that a national emergency exists in connection with and to the extent necessary for the proper observance, safeguarding, and enforcing of the neutrality of the United States and the strengthening of our national defense within the limits of peace-time authorizations," and added that "specific directions and authorizations will be given from time to time for carrying out these two purposes." The Administrator further pointed out that the President had never authorized or directed the making effective of Section 902's requisitioning powers; although he had issued orders under the proclamation to other agencies and in other connections; that the President had consistently affirmed his intention to adhere to specific directions and authorizations in carrying out the purposes of the September 1939 proclamation; and that the President had consistently distinguished between a limited emergency, such as that declared in September 1939, and a full national emer-

b. There is much to be said for the definitive selection of the opening of World War II as the beginning of the period of excluded enhancement. The fixed date simplifies calculation, and certainly the Comptroller General rightly states that the commencement of a general European war was bound to cause ship values to jump enormously. Congress enacted the "enhancement" clause with World War I shipping history well in mind, especially the rise in merchant ship values from 1914 to 1917, and the fact that they had reached high levels by the time this country entered the war in April 1917. *Supra*, pp. 25–32, 93–99. It is not unreasonable to say that, in Congress' eyes, the "normal" or the "fair" market would be that existing before the breaking out of a titanic international struggle which would necessarily inflate ship prices sharply, even though the United States was not yet a participant in the conflict. On this view, Congress equated the existence of such a general state of war—into which this country

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gency (as declared in May 1941). Certain congressional statements and actions during the period from 1939 to 1941, inconsistent with the view that the requisitioning power had become effective in September 1939, were also adduced. Cf. paraphrase of and excerpts from the Administrator's letter in 22 Comp. Gen. at 608–610.

The Comptroller General's second decision (22 Comp. Gen. 608, January 7, 1943) withdrew the earlier suggestion that power to requisition existed in September 1939, but reaffirmed his earlier conclusion even on the assumption that it was not [illegible] until the proclamation of unlimited emergency in May 1941 that the power became effective.

might well be drawn—with the "cause necessitating the taking," if we thereafter entered the struggle and requisitioned vessels in prosecution of the war. Section 902's "enhancement" clause would then parallel those of Great Britain's and Canada's 1939–1940 legislation, which exclude any appreciation in value due to the "emergency" or the "war" (*supra*, pp. 71–72).[87] And, in the case of World War II, this construction would bar substantially all of the great increase in ship values which occurred after September 1939. *Supra*, pp. 105–7.

4. The Advisory Board on Just Compensation defined the "causes necessitating the taking" to include "the Government's need of vessels which has necessitated the taking," "the previous taking of vessels of similar type," and "a prospective taking, reasonably probable"——whether such need, taking, or prospect occurred before or after the proclamation of an unlimited emergency on May 27, 1941—but not to include "a general rise in prices or earnings, whenever occurring." Rule 4, *infra*, pp. 139–140. We read the first part of this

[87] Support for this view may be drawn from the refusal of Congress, in 1939, to amend the clause so as to bar only enhancement due to the "immediate" causes necessitating the taking. *Supra*, pp. 98–9. It may also be said to be supported by the Congressional references—in the course of consideration of the "enhancement" proviso—to the clause as insuring the payment of peacetime prices, of the "value prior to the emergency," of "normal values," or of values before the "war comes on." *Supra*, pp. 96–9.

definition to cover the Government's general need for vessels in carrying on its defense and war activities, whether the ships remained in private hands or came into Government possession.[88] So construed, it apparently marks the beginning of excluded enhancement as the time when the Government itself begins to undertake or sponsor significant activities involving shipping.[89] This view is, of course, more nearly kin to the accepted judicial doctrines concerning value-to-the-taker (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53) and increment-due-to-initiation-of-the-project (*United States* v. *Miller*, 317 U. S. 369); and it may also be somewhat closer to the common un-

[88] This seems to accord with the War Shipping Administration's interpretation of Rule 4.

Enhancement attributable to the "Government's need" and the Government's takings would, as we read it, include increases in values due to (a) the increased demand for vessels to carry military, naval, or other defense cargoes (including lend-lease shipments), whether the vessels remained in private hands or were sold or chartered to the Government, or were requisitioned; and (b) an actual or potential shortage of merchant vessels (whether for private use or to fulfill Governmental needs) because of the great increase in the "Government's need" or because of the Government's past or future requisition program.

The reference to a "general rise in prices or earnings" is to a general rise with respect to other commodities or industries, as well as to rise in prices and earnings of merchant vessels *not* consisting of excluded enhancement. See *infra*, pp. 139–140, 148–9.

[89] In World War II, the War Shipping Administration considered this period to have begun in the opening weeks of 1941. *Supra*, p. 108. The ship-values as of that time are described, in rough, at p. 107, *supra*.

derstanding of the clause's wording. On the other hand, the Board's stress on the "Government's need of vessels," as the main "cause necessitating the taking," may not go far enough to fulfill the statute's purpose.

5. The Advisory Board and the Comptroller General are certainly correct in concluding that excluded enhancement cannot be limited to that accruing in the period after the declaration of May 27, 1941, proclaiming the "national emergency", which was considered as bringing into life the requisitioning powers of Section 902. It seems fairly certain that Congress was concerned to strike down at least some of the increase in ship values occurring before the situation became serious enough to authorize requisitions. Otherwise, the "enhancement" clause would be quite ineffective as a limit on prices in the normal case of takings immediately following a proclamation of national emergency or a declaration of the advisability of requisitioning.[30] The "causes necessitating the taking," in Congress' sense, would ordinarily antedate the general determination that vessels can be taken. Accordingly, it is too narrow a construction to read the phrase as simply referring to the formal coming-into-existence of the national emergency proclaimed by the President,

[30] World War II was atypical, in that a year intervened between the President's proclamation and the general exercise of the requisitioning power. *Supra*, pp. 106–7.

thus excluding only such enhancement as occurs after that date.

D. *Constitutionality of the different interpretations of the statute.*—As we have pointed out (fn. 43, *supra*, p. 64), our discussion of the "enhancement" clause's constitutionality (Point II, *supra*) has not contained separate treatments of the various interpretations (the Comptroller General's and the Advisory Board's) because we think the statute valid under either construction. Like the Comptroller General, the allied nations to whose regulations we have referred (*supra*, pp. 71–3) eliminate any "enhancement" in values due to the "war" or the "emergency," and these provisions warrant the basic fairness and justice of a similar reading of Section 902 of the Merchant Marine Act, 1936.[91] A legislative judgment that shipowners should not receive inflated values attributable to a war, into which this country was later drawn, cannot be deemed confiscatory, arbitrary, or unreasonable.

The constitutionality of the other interpretation of the clause follows *a fortiori*. As we have shown, the elimination of value-increase stemming from the Government's general need for shipping (i. e., the Advisory Board's rule) comes close to the judicial principles already announced by the

[91] The Canadian statute was not enacted until August 7, 1940; the Australian "Basis of Compensation Order" was issued in March 1942. *Supra*, pp. 71–3.

Court, in cases in which Congress has not itself laid down any measure of just compensation. *Supra*, pp. 69–71, 121–2.[92]

IV

APPLICATION OF THE "ENHANCEMENT" CLAUSE TO THE INSTANT CASE

Although the Court of Claims did not detail its understanding of the meaning of the "enhancement" clause, it found (R. 12–13) that (a) beginning on September 8, 1939 (the date of the proclamation of a limited national emergency) and continuing up to the date that respondent's vessel was requisitioned [October 15, 1942], there was a general rise in the market values of nearly all vessels in and about the Port of New York; (b) this increase in values between September 8, 1939 and May 27, 1941 (the date of the proclamation of unlimited emergency) "was due to the demand for vessels which followed the outbreak of war in Europe";

[92] It is not clear whether the first Advisory Board considered that its rules would satisfy all constitutional requirements if they were to be applied by courts, but one may guess that at least two of the members reached that issue and answered it affirmatively. The second Board expressly stated that its supplementary rules—incorporating and amplifying the earlier rules—"conform to the requirements of the Constitution of the United States." *Infra*, p. 149. Both Boards' terms of reference provided that they were to act "in accordance with the applicable provisions of the Constitution and the laws of the United States." Fn. 3, *supra*, pp. 6–7.

(c) after May 27, 1941, and particularly after December 7, 1941 (the attack on Pearl Harbor), "the rise in market values was due [i] to the Government's need for vessels, which necessitated the taking of many vessels, and [ii] to the great increase in shipping and in harbor traffic which occurred during the period of the war." The Court found that "these conditions combined to create a demand for and a shortage of tugs," and, as a result, the value of respondent's tug, the *MacArthur,* had been enhanced by the sum of $5,000 by the date of taking, October 15, 1942 (R. 13).[93]

A. On the Comptroller General's view, the entire enhancement of $5,000 would clearly be deducted, possibly less some sum for enhancement not directly caused by economic conditions resulting from the emergency. Such a possible allowance of permissible enhancement has not been touched upon by the Court of Claims, and we are unable to say definitely whether any existed in this case, though the court's findings—which stress the effect of the war on tug values in New York—seem to negative it.

B. Under the Advisory Board's rule, an undetermined, but certainly substantial, portion of the

[93] The court also found that the "rising market and a strong demand for tugs of all types" which existed in the Port of New York at the time of requisition, "was due to the greatly increased traffic in the harbor during the period of the war, to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs" (R. 11–12).

$5,000 lump of enhancement should be eliminated. The findings expressly attribute a part of the increase in values to "the Government's need for vessels, which necessitated the taking of many vessels" (R. 13), as well as "to the fact that the Government had been requisitioning tugs and to the resulting shortage of tugs" (R. 12). Such enhancement is clearly within Rule 4 (*infra*, pp. 139–140), as the Court of Claims appears to acknowledge (R. 14).

The remaining enhancement since 1939, the court has found, was due to "the demand for vessels which followed the outbreak of war in Europe" (R. 12) and to "the great increase in shipping and in harbor traffic which occurred during the period of the war" (R. 13, 12), without specifying the nature of this harbor traffic. It may very well be that much, if not all, of this value-increase was due to the Government's need for vessels, in the liberal sense in which we believe the Advisory Board used that phrase, and with which we agree (*supra*, pp. 120–1), but which the court below has apparently not used in its findings. For instance, an increase in New York harbor traffic because of munitions or lend-lease shipments to Great Britain or the Soviet Union would be covered, even though the carrying vessels were privately owned or operated, or were foreign vessels. The Court of Claims has said that it is not possible to allocate a definite part

of the increase in market value to the Government's need for vessels in the prosecution of the war (R. 14), but it is probable that some fair judgment can be made, especially if the full meaning of the "Government's need for vessels" is applied.

Moreover, the findings themselves indicate the likelihood that the larger part of the $5,000 enhancement from September 1939 to October 1942 accrued in the seventh month period respondent held the vessel (March 19, 1942—October 15, 1942). For respondent purchased the tug in an open-market transaction for $2,875 (R. 8), and added roughly $6,000 in repairs and reconditioning (R. 9), a total of about $9,000. If the *MacArthur's* market value was $15,500 (R. 12) on October 15, 1942, it is probable both that the sharp value-increase occurred in the interim, and that it was wholly due to the Government's great need for vessels (in the large sense) in 1942.

C. If the Adyisory Board's interpretation of the "enhancement" clause is accepted, the question of the exact amount to be deducted would remain for determination by the court below, unless it is felt that the present findings require the elimination of the entire increase. If the September 1939 date is accepted as decisive, the whole of the $5,000 enhancement would appear to be deductible.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below is erroneous and should be reversed.

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Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
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PAUL D. PAGE, JR.,
Solicitor,
U. S. Maritime Commission.

DECEMBER 1948.

APPENDIX A

1. The pertinent portions of the Merchant Marine Act, 1936 (Act of June 29, 1936, c. 858, 49 Stat. 1985, 2011, 2015) provide as follows:

> SEC. 802. Every contract executed by the Commission under authority of title V [*i. e.* "Construction-Differential Subsidy"] of this Act shall provide that:
>
> In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the fair actual value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels. In computing the value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the Bureau of Internal Revenue for income-tax purposes.
>
> The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.
>
> * * * * * *
>
> SEC. 902. (a) It shall be lawful for the Commission to requisition any vessel documented under the laws of the United States,

during any national emergency declared by proclamation of the President, and when so taken or used, the owner shall be paid the fair actual value of the vessel at the time of taking, or paid the just compensation for the vessel's use based upon such fair actual value (excluding any national defense features previously paid for by the United States), less a deduction from such fair actual value of any construction differential subsidy allowed under this Act, and in no case shall such fair actual value be enhanced by the causes necessitating the taking. In the case of a vessel taken and used, but not purchased, the vessel shall be restored to the owner in a condition at least as good as when taken, less reasonable wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the vessel in such condition. The owner shall not be paid for any consequential damages arising from such taking or use.

(b) Except in cases of vessels where a construction differential subsidy has been allowed and paid, in which case the value of the vessel for the purposes of this section shall be established as provided in section 802, the Commission shall ascertain the fair compensation for such taking or use and shall certify to Congress the amount so found by it to be due for appropriation and payment to the person entitled thereto. If the amount found by the Commission to be due is unsatisfactory to the person entitled thereto, such person shall be entitled to sue the United States for the amount of such just compensation and such suit shall be brought in the manner prescribed by paragraph 20 of section 24, or by section 145 of the Judicial

Code, as amended (U. S. C., title 28, secs. 41, 250).

2. The pertinent portions of the Merchant Marine Act, 1936 (Act of June 29, 1936, c. 858, 49 Stat. 1985), as amended by the Act of June 23, 1938, c. 600, sec. 33, 52 Stat. 962, and the Act of August 7, 1939, c. 555, sec. 3, 53 Stat. 1255, 46 U. S. C. 1212, 1242, provide as follows:

> SEC. 802. Every contract executed by the Commission under authority of title V of this Act [*i. e.*, "Construction-Differential Subsidy"] shall provide that—
>
> In the event the United States shall, through purchase or requisition, acquire ownership of the vessel or vessels on which a construction-differential subsidy was paid, the owner shall be paid therefor the value thereof, but in no event shall such payment exceed the actual depreciated construction cost thereof (together with the actual depreciated cost of capital improvements thereon, but excluding the cost of national-defense features) less the depreciated amount of construction-differential subsidy theretofore paid incident to the construction or reconditioning of such vessel or vessels, or the fair and reasonable scrap value of such vessel as determined by the Commission, whichever is the greater. Such determination shall be final. In computing the depreciated value of such vessel, depreciation shall be computed on each vessel on the schedule adopted by the Bureau of Internal Revenue for income-tax purposes.
>
> The foregoing provision respecting the requisition or the acquisition of ownership by the United States shall run with the title to such vessel or vessels and be binding on all owners thereof.

SEC. 902. (a) Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, such property shall be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition. The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section.

(b) When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 802 of this Act, and in determining the value of

any vessel taken or used, on which a construction-differential subsidy has not been paid, the value of any national defense features previously paid for by the United States shall be excluded.

(c) If any property is taken and used under authority of this section, but the ownership thereof is not required by the United States, the Commission, at the time of the taking or as soon thereafter as the exigencies of the situation may permit, shall transmit to the person entitled to the possession of such property a charter setting forth the terms which, in the Commission's judgment, should govern the relations between the United States and such person and a statement of the rate of hire which, in the Commission's judgment, will be just compensation for the use of such property and for the services required under the terms of such charter. If such person does not execute and deliver such charter and accept such rate of hire, the Commission shall pay to such person on account of just compensation a sum equal to 75 per centum of such rate of hire as the same may from time to time be due under the terms of the charter so tendered, and such person shall be entitled to sue the United States to recover such further sum as added to such 75 per centum will make up such amount as will be just compensation for the use of the property and for the services required in connection with such use. In the event of loss or damage to such property, due to operation of a risk assumed by the United States under the terms of a charter prescribed in this subsection, but no valuation of such vessel or other property or mode of compensation has been agreed to, the United States

shall pay just compensation for such loss or damage, to the extent the person entitled thereto is not reimbursed therefor through policies of insurance against such loss or damage.

(d) In all cases, the just compensation authorized by this section shall be determined and paid by the Commission as soon as practicable, but if the amount of just compensation determined by the Commission is unsatisfactory to the person entitled thereto, such person shall be paid 75 per centum of the amount so determined and shall be entitled to sue the United States to recover such further sum as, added to said 75 per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section 24, paragraph 20, and section 145 of the Judicial Code (U. S. C., 1934 edition, title 28, secs. 41, 250).

* * * * *

(e) The Commission is authorized to repair, recondition, reconstruct, and operate, or charter for operation, any property acquired under authority of this section. The Commission is further authorized to transfer the possession or control of any such property to any department or agency of the Government of the United States upon such terms and conditions as may be approved by the President. In case of any such transfer the department or agency to which the transfer is made shall promptly reimburse the Commission for its expenditures on account of just compensation, purchase price, repairs, reconditioning, reconstruction or charter hire for the property transferred. Such reimbursements shall be deposited in the construction fund established by section 206 of this Act.

3. Pertinent portions of the Act of June 6, 1941, c. 174, 55 Stat. 242, as amended, ("An Act to authorize the acquisition by the United States of title to or the use of domestic or foreign merchant vessels for urgent needs of commerce and national defense, and for other purposes") are as follows:

> * * * That whereas Congress has power to provide for the common defense and general welfare and to regulate commerce with foreign nations and whereas for this purpose embargo Acts and nonintercourse Acts have from time to time been passed and whereas the commerce of the United States is at the present time interrupted and the general welfare of its citizens is threatened and an emergency has been declared, for the purposes of national defense, during the existence of the national emergency declared by the President on September 8, 1939, to exist, but not after June 30, 1942, the President is authorized and empowered, through such agency or officer as he shall designate, to purchase, requisition, for any period during such emergency charter or requisition the use of, or take over the title to, or the possession of, for such use or disposition as he shall direct, any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense: *Provided*, That just compensation shall be determined and made to the owner or owners of any such vessel in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended
> * * *

APPENDIX B

Letter of Transmittal and Report of Advisory Board on Just Compensation

Advisory Board on Just Compensation,
Washington, D. C., December 7, 1942.

Dear Admiral Land: We are herewith enclosing our report as the Advisory Board on Just Compensation. In it we have set forth in the form of rules the standards and principles to be observed, in respect of the valuation of vessels requisitioned for title or use by the United States, and in the disposition of matters which have arisen and will arise in connection with the granting of insurance upon and the voluntary chartering of vessels.

In arriving at the conclusions the rules embody we have been greatly aided by the material contained in Document 20, in the hearings before the Bland committee, and by the arguments and briefs filed at the public hearing held on November 26 and 27. Because of the full and exhaustive character of these aids to our deliberations, our labors have been greatly lightened, the time required for them has been shortened, and our confidence in the correctness of the rules we have embodied in our report as our best judgment in the premises has been greatly enhanced.

It seems appropriate to comment briefly on the Comptroller General's ruling of November 28, 1942. Contrary to the impression existing in many quarters, the Comptroller General does not

limit compensation in the case of requisitioned vessels to values existing on September 8, 1939. That date is used merely as the starting point for the determination of values. The necessity of allowing subsequent enhancement that is not directly caused by economic conditions resulting from the emergency is specifically recognized by him. This standard does not necessarily exclude subsequent enhancement which directly reflects the economic changes incident to the improvement in general conditions since 1939.

It is obviously impossible to know without very extensive inquiry into the facts to what extent any enhancement in value was due to that cause, and the order which created the Board confined its duties to the establishing of "standards, rules, and formulae." On this account we did not undertake to consider how far the rules we are submitting would in practice reach different results from the rules recommended by the Comptroller General. It is conceivable that in application the difference might turn out to be far less than has at times been assumed, and that the dispute would appear to be more in the reasoning by which the problems were solved than in the answers reached.

We have been greatly impressed not only with the care and consideration which the record discloses that both you and the Comptroller General have given to the matters involved, but with the moderation and judgment exercised by all concerned in endeavoring to work out a solution consistent with the interest of the United States and the justice of the case. In closing we take this

opportunity to record our great appreciation of the fact that this has been so.

Respectfully,

(Signed) LEARNED HAND.
(Signed) JOHN J. PARKER.
(Signed) JOSEPH C. HUTCHESON, JR.

Admiral EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the order of the President of October 15, 1943, establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States," establishes "fair and equitable standards, rules, and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisitioned, purchased, chartered, or insured by the Administration."

Rule 1.—Just compensation for vessels requisitioned for title or for use is to be determined on the basis of value as of the date of taking, subject to deduction on account of enhancement, if any, as hereinafter set out in rule 4, and with allowance for any loss on account of delay in payment from the date of taking, not exceeding the current commercial rate of interest. Value means value on the American market, not on foreign markets.

Rule 2.—In the case of requisition of foreign-flag vessels under Public Law 101, just compensation should be determined as in the case of domestic vessels.

Rule 3.—Where market value cannot be determined by sufficient sales, or hirings of vessels of like character, made at or about the time of taking, it is to be determined by the Administrator from a consideration of cost of construction, acquisition cost so far as relevant, improvements, replacement costs, depreciation, earnings, physical condition, appraisals for insurance or other purposes, and any other relevant facts upon which a reasonable judgment as to value can be based. These various matters are to be given such weight by the Administrator, as in his opinion they are justly entitled to, in determining the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy.

Rule 4.—From the value at the time of taking, there should be deducted any enhancement due, to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occurring, should not be deducted. In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of

taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted.

Rule 5.—The enhancement clause of section 902 (a) of the Merchant Marine Act of 1936, has no application to the valuation of chartered vessels for the purpose of insurance.

Rule 6.—The enhancement clause of section 902 (a) has no application to voluntary charters or purchases under Public Law 101.

Rule 7.—In the event of loss due to a risk assumed by the United States in connection with the use of any vessel where no valuation or other mode of compensation has been agreed to, just compensation should be determined on the basis of value on the date of such loss. Where a redetermination or readjustment of rates or values is effected pursuant to the terms of a charter or other agreement, just compensation should be determined as of the date of redetermination. In both cases the determination is subject to deduction on account of enhancement, if any, as hereinabove set out in rule 4.

Rule 8.—Section 902 (b) of the Merchant Marine Act of 1936 has no application to vessels merely because they have received mail subsidies under the act of 1928. The section has application only to vessels which have received a construction-differential subsidy under title V of the Merchant Marine Act of 1936; and a mail subsidy is not a construction-differential subsidy within the meaning of section 902 (b) of the act.

Rule 9.—Valuations agreed upon by the Administrator and owners are binding, if not in excess of just compensation determined as above prescribed; and settlements should be made on the basis of such valuations with an allowance for any actual loss due to the delay in payment from the date when such settlements would have been made, if no objections had been raised, not exceeding the current commercial rate of interest.

Rule 10.—Agreements fixing compensation for the title or use of vessels are not binding in the valuation of vessels of owners not parties to the agreements. Such valuations; however, if freely arrived at, may be considered along with other factors as some evidence of value.

LEARNED HAND.
JOHN J. PARKER.
JOSEPH C. HUTCHESON, JR.

DECEMBER 7, 1943.

APPENDIX C

Letter of Transmittal and Report of Second Advisory Board on Just Compensation

Advisory Board on Just Compensation,
Washington, D. C., October 26, 1945.

Dear Admiral Land: We are herewith enclosing our report as the Advisory Board on Just Compensation, supplementing the rules stated by the Board, as previously constituted, on December 7, 1943, and setting forth in particular the standards and principles to be observed in respect of the valuation of idle foreign merchant vessels requisitioned for title or use under Public Law 101, 77th Congress (Act of June 6, 1941, 55 Stat. 242).

This report in the main merely amplifies the earlier report of the Board. Since the problems involved now turn almost wholly on issues of fact which were presented to us in sharply disputed form, we could do no more than restate more explicitly, as applicable to the precise issues here involved, the appropriate rules of law relied on in the earlier report. We realize that the concern of the parties is more as to the application of the rules of law to the facts than as to the statement of such rules; and we regret that the factual disputes prevent us from being more helpful at this stage of the proceedings. Nevertheless, we believe that the rules here stated, applied reasonably and justly to the interests of the owners and the United States alike, will give you the basis upon which you can make the neces-

sary findings of fact for the application of the statutory directive.

We invite your particular attention to our Supplementary Rule 5, wherein we point out that it is neither legally possible nor practicable to state rules determining the amount or extent of weight to be given to the various matters of evidence relevant to the issue of value which is the basis for the determination of just compensation for the requisitioned vessels. When such matters arise in courts of law, the trier of facts, whether court or jury, cannot be required, in the exercise of reasoned judgment, to attribute a specific weight to each of the elements considered in reaching a final conclusion; indeed, any attempt so to restrict judgment would be legally erroneous. We can see that lack of such definite apportionment of values to the evidence here pertinent will make it more difficult for you to develop a general directive comparable, for example, to your former Order 37 which seems to have been remarkably effective in bringing about satisfactory adjustments with American owners pursuant to the rules announced previously by the Board. Nevertheless, we think that since the determinations of fact here requisite are to a considerable extent of a general nature applicable to many vessels, you may, if you so choose, follow your previous practice in substance by making general findings from the evidence, such as, the extent, if any, of the depressive effect of the burdens, and the extent, if any, of a rise in value of the vessels up to the time of taking due to a general rise in value of merchant vessels, and either offset the two if you find them to be substantially equal,

or make such other disposition as the facts require, thus developing a general standard of valuation applicable, with necessary modifications in particular instances, to most of the vessels involved. Our rules do not prevent the adoption of such a general standard provided that it is arrived at as a reasoned conclusion from all the relevant facts.

We have been greatly aided by the very careful briefs and informative arguments of all the counsel here involved and with the admirable spirit shown of desiring and reaching for a solution of these important and troublesome questions. We have no doubt that with the continuance of that spirit they will be resolved with dispatch and to the satisfaction of all concerned.

Respectfully.

(Signed) JOSEPH C. HUTCHESON, JR.
(Signed) CHARLES E. CLARK.
(Signed) IRWIN UNTERMEYER.

Admiral EMORY S. LAND,
War Shipping Administration,
Washington, D. C.

REPORT OF THE ADVISORY BOARD ON JUST COMPENSATION TO THE WAR SHIPPING ADMINISTRATION

Pursuant to the orders of the President of September 10 and 24, 1945, re-establishing it, the Board hereby "in accordance with the applicable provisions of the Constitution and the laws of the United States" establishes "fair and equitable standards, rules and formulae of general applicability for the guidance of the War Shipping Administration in determining the just compensation to be paid for all vessels requisi-

tioned pursuant to the Act of June 6, 1941, 55 Stat. 242".

Supplementary Rule 1.—The rules promulgated by this Board on December 7, 1943, as here modified, are reasserted and held applicable to the pending questions before the War Shipping Administration. In particular, Rule 2, providing, "In the case of requisition of foreign-flag vessels under Public Law 101, [Act of June 6, 1941, 55 Stat. 242] just compensation should be determined as in the case of domestic vessels" shall apply. The statement in Rule 1 that "Value means value on the American market, not on foreign markets" is modified as applied to the foreign merchant vessels here involved to read, "Value means value of the vessel in the port where the taking occurs with due regard to value on any available foreign market". Hence, the Administrator, in finding value pursuant to Rule 3, should give due weight to values shown to exist on accessible foreign markets, subject to any additions or deductions due to the then positions of the vessels.

Supplementary Rule 2.—Relevant facts on the issue of value of the vessels, as defined in Rules 1 and 3, may properly include (if their existence be found) sales upon foreign markets, including South American markets, charters or attempts or failures to charter on American and foreign markets, and like evidence bearing upon "the price that would probably result from fair negotiations between an owner willing to sell and a purchaser desiring to buy". In weighing such evidence, the Administrator should test its persuasive force in the light of any showing of

markedly different circumstances, unusual conditions, limited numbers, lack of bona fides, or conditional character, of such sales or of other factors lessening its utility for resolving the ultimate question as herein stated. The Administrator should also consider the effect of any special circumstances or conditions or burdens affecting the vessels here involved, and not equally applicable to others as to which evidence of sales prices has been received, and determine the price which would probably result from fair negotiations as above described, as to vessels thus burdened. In this connection consideration should be given to the effect, on the date of requisition, of the probable duration of such conditions or burdens (if found to exist) in the light of the existing international situation, the uncertainties of war and the consequences of any reasonably foreseeable action by the various Governments interested in the use or disposition of the vessels.

Supplementary Rule 3.—Market value as distinguished from value otherwise determined under Rule 3 means value in the foreign or domestic markets, provided that the existence of such markets is established by evidence showing:

(1) The market is available to the owners of the requisitioned vessels at the dates of requisition.

(2) There have been sufficient sales on such market of vessels of like character at or about the time of requisition to support the conclusion that such a market exists.

(3) The sales must be bona fide, and not in fact concealed reservations of title.

(4) The markets must be adequate to absorb the supply of vessels offered.

If more than one market was available, value should be based on the highest available market in accordance with the provisions of Supplementary Rule 1. From such market value, if found, must be deducted any enhancement of value excludable under Rule 4.

Supplementary Rule 4.—Under the circumstances here disclosed by the parties, namely a very grave dispute of fact as to the existence of market values, the Administrator may properly resort to the other evidential factors stated in Rule 3 as tending to show value, including in addition to the matters stated in that rule, owners' admissions, offers to sell or charter and prior valuations, and accord them such weight as under the circumstances of their utterance appears fair and just. In applying Rule 3, the factor of reproduction costs does not necessarily imply reproduction in American shipyards, but should be determined on the basis of the available place or places where a reasonably prudent shipowner probably would have undertaken to reproduce the requisitioned vessels. The actual cost at which replacement has been made by an owner is evidence of such reproduction costs. While reproduction costs shall be depreciated according to the age of the vessels, no fixed rate of depreciation can be stated; the amount of depreciation must be found by the Administrator in the light of approved expert opinion or other relevant evidence before him.

Supplementary Rule 5.—Since under settled precedents "in accordance with the applicable

provisions of the Constitution and the laws of the United States", the various matters referred to in Supplementary Rule 4 are to be given such weight by the Administrator as in his opinion they are entitled to, in determining the price that would probably result from fair negotiations as stated in Rule 3, no rules can legally or practicably be stated to govern the exercise of that judgment, which must be guided by the strength and force of the evidence. It is considered, however, that certain evidence is normally of greater persuasive force than other evidence, in this order: first, sales prices in an open market, if any; second, fair reproduction and replacement costs, and third, the other factors herein claimed by the parties. As to matters offered to show a peculiar depressing effect on the fair sale value, such as the existence of special circumstances and burdens, the Administrator should properly require the affirmative establishment both of their existence and of their probable effect upon the price which a purchaser would be willing to pay for the vessels.

Supplementary Rule 6.—The time as to which value is to be fixed is the time of requisition, and values at periods either before or after such time shall be evidential only and not controlling as to the value for "just compensation". The provision in Rule 4 that "Enhancement due to a general rise in prices or earnings, whenever occurring shall not be deducted" shall be taken to include a general rise in prices and earnings of merchant vessels, not due to the Government's need of vessels which has necessitated the taking, to the pre-

vious taking of vessels of similar type, or to a prospective taking, which is reasonably probable.

Supplementary Rule 7.—As to the shipowners here involved, it appears just and equitable that compensation for loss due to delay in payment, provided in Rule 9, shall be paid in each case at the current commercial rate of interest, without discrimination depending upon the financial or other circumstances of each owner. Such rate of interest shall be the rate found by the Administrator to be the rate at which solvent business corporations could have borrowed the money for a period not shorter than the already existing period of delay. Mere failure to provide information or otherwise actively to cooperate with the Administrator in fulfilling his statutory duties of determining just compensation and causing deposit thereof with the Treasurer of the United States shall not be a bar to its payment, but compensation may be denied for any period of delay caused by affirmative action of a shipowner, such as a request by such owner that the determination of just compensation be delayed for his convenience.

Supplementary Rule 8.—These rules conform to the requirements of the Constitution of the United States and with the applicable standards of international law.

(Signed) Joseph C. Hutcheson, Jr.
JOSEPH C. HUTCHESON, JR.
(Signed) Charles E. Clark.
CHARLES E. CLARK.
(Signed) Irwin Untermeyer.
IRWIN UNTERMEYER.

OCTOBER 26, 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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No. 132

In the Supreme Court of the United States

OCTOBER TERM, 1948

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

APPENDICES D, E, AND F TO BRIEF FOR THE UNITED STATES

APPENDIX D

Just compensation claims in litigation arising out of the functions of the War Shipping Administration or Maritime Commission (November 15, 1948)

Name of vessel	Name of petitioner	Court		Date filed	Petitioner's claim			Determination of value or use		Date of determination	Registry of vessel	Type of vessel	Late requisitioned		Requisitioned by—		Nationality of petitioner	Paid on account or deposited in Treasury	Balance of petitioner's claim
		Court of Claims No.	U. S. District Court No.		Title	Use and miscellaneous	Total	W. S. A.	U. S. M. C.				Title	Use	W. S. A.	M. C.			
Aagot	O/Y Sea Freight A/B	48423		12-30-47	$881,788.62		$881,788.62	$131,002.00		12-17-45	Finnish	Dry cargo	12-27-41			x	Finnish	$131,002.00	$750,786.62
Abgara (Ex-Denny)	Latvian State Cargo & Passenger Steamship Line	47861		8-22-47	125,000.00		125,000.00				Latvian	do	6-1-42		x		Latvian	22,500.00	102,500.00
Advance	Rederiaktiebolaget Advance	48430		12-31-47	657,896.71		657,896.71	28,980.00		12-17-45	Finnish	do	12-27-41			x	Finnish	28,980.00	628,916.71
A. H. Smith	Great Lakes Transit Corp	48713		6-18-48		(Misc.) $2,253.21	2,253.21	50¢ dwt. charter hire.		7-31-43	United States	do	12-12-42			x	American		2,253.21
Airdale	Copper River Packing Co	48828		9-1-48		26,448.00	35,210.73	D B/B 14.31		9-6-42	do	Fishing		9-6-42	x		do		35,210.73
						(Misc.) 8,762.73													
Anja	Rederiaktiebolaget Atlanta Laivanvarustajaosakeyhtio Atlanta.	48429		12-31-47	1,336,159.73		1,336,159.73	271,611.09		12-17-45	Finnish	Dry cargo	12-27-41			x	Finnish	271,611.00	1,064,548.73
Alaskan	American Hawaiian Steamship Co		133-397 (S. D. N. Y.)	11-27-44	1,035,000.00	(Misc.) 40,598.19	1,075,598.19	776,003.00		11-13-44	United States	do	11-28-42 Loss		x		American	582,002.25 Int. 6,088.99	493,595.94
Alert	Alert Fishing Corp	48377		12-12-47	65,000.00	(Misc.) 7,600.00	72,600.00				do	Fishing	8-20-46			x	do		72,600.00
Angelina	A. H. Bull Steamship Co		133-151 (S. D. N. Y.)	10-16-44	2,000,000.00	(Misc.) 6,449.24	2,006,449.24	1,198,828.54		8-11-45	do	Reef	10-18-42 Loss		x		do	899,121.41	1,107,327.83
Algonquin	Agwilines, Inc	48809		8-19-48	3,000,000.00		3,000,000.00				do	Passenger and cargo	9-27-46		x		do		3,000,000.00
Alsund	Dampskibsselskabet "Hafnia" Aktieselskab	47749		7-10-47	775,009.05		775,009.05	254,675.00		12-17-45	Danish	Dry cargo	7-12-41			x	Danish	50,000.00	725,009.05
Asta	Rederi A/B Asta	48424		12-30-47	446,203.07		446,203.07	14,530.00		12-17-45	Finnish	do	12-27-41			x	Finnish	14,530.00	431,673.07
Atlas II	do	48424		12-30-47	222,887.00		222,887.00	7,183.00		12-17-45	do	do	12-27-41			x	do	7,183.00	215,704.00
Aurora	Rederiaktiebolaget Atlanta-Laivanvarustajaosakeyhtio Atlanta.	48429		12-31-47	710,000.00 (Plus return of vessel.)		710,000.00	710,000.00		8-28-46	do	do	12-27-41			x	do	460,000.00	250,000.00
Back Bay	Gartland Steamship Co	47753		7-16-47	333,346.00		333,346.00	85,000.00		5-11-45	United States	do	7-6-42		x		American	63,750.00	269,596.00
Bennington	do	47753		7-16-47	124,364.00		124,364.00	40,000.00		5-11-45	do	do	7-6-42		x		do	30,000.00	94,364.00
Brockton	do	47753		7-16-47	294,395.00		294,395.00	85,000.00		5-11-45	do	do	6-24-42		x		do	63,750.00	230,645.00
Brösund	Dampskibaselskabet "Hafnia" Aktieselskab	47749		7-10-47	630,319.64		630,319.64	211,889.00		12-17-45	Danish	do	7-12-41			x	Danish	50,000.00	580,319.64
Bridgeport	Bridgeport Steamship Corp	48714		6-18-48	760,000.00	BB 7,000.00	757,000.00		$71,021.34	6-17-48	United States	do	6-29-42		x		American		757,000.00
Badger State	Illinois Atlantic Corp		134-374 (S. D. N. Y.)	1-26-45		38,590.48 (Misc.) 20,000.00	58,590.48	M B/B 2,894.46		1-2-43	do	do		1-2-43	x		do		58,590.48
Buckeye State	do		134-374 (S. D. N. Y.)	1-26-45		29,403.22	29,403.22	M B/B 2,941.20		2-2-43	do	do		2-2-43	x		American		29,403.22
C. T. Jaffray	Great Lakes Transit Corp	48713		6-18-48		(Misc.) 1,005.90	1,005.90			9-22-42	do	do	7-24-42		x		do		1,005.90
Chester	Pontin Boat Corp	48565		2-25-48	68,000.00		68,000.00	25,000.00		3-31-44	do	Lighter	2-27-43		x		do		68,000.00
City of Lowell	Max Rose, Trading as Northern Metals Co	46978		4-24-46	175,000.00		175,000.00	17,800.00		9-12-44	do	Dry cargo	6-20-42		x		do	13,350.00	161,650.00
City of Fort Worth	Southern Steamship Co		153 of 1944 (E. D. Pa.)	10-13-44		348,600.00	348,600.00	M B/B 4,938.50		10-13-42	do	do		10-13-42	x		do	71,662.89	276,937.11
Colabee	Illinois Atlantic Corp	48630		4-19-48		1,002,025.74	1,002,025.74	M B/B 8,830.00		1-10-42	do	do		1-10-42		x	do		1,002,025.74
Concrete Scow	Israel Jacobson	48273		12-1-47	5,000.00		5,000.00	1,000.00		10-26-44	do	Scow	10-26-44		x		do	750.00	4,250.00
Columbia	Aktieselskabet Dampskibsselskabet Orient	47751		7-10-47	1,302,942.59		1,302,942.59	745,349.00		12-17-45	Danish	Dry cargo	6-12-41		x		Danish	50,000.00	1,252,942.59
Cornelia	A. H. Bull Steamship Co		130-340 (S. D. N. Y.)	4-29-44		566,664.88 (Misc.) 201,891.25	768,556.13	M B/B 9,987.63		4-8-42	United States	do		4-8-42	x		American		768,556.13
Daniel Willard	Great Lakes Transit Corp	48713		6-18-48		(Misc.) 395.32	395.32			9-22-42	do	do	6-23-42		x		do		395.32
Delaware	Aktiebolaget Helsingfors Steamship Co., Ltd	48431		12-31-47	881,415.80		881,415.80	17,662.00		12-17-45	Finnish	do	12-27-41			x	Finnish	17,662.00	863,753.80
Delisle	Baltimore Insular Line, Inc		130-342 (S. D. N. Y.)	4-29-44		170,272.10 (Misc.) 98,132.03	268,404.13	M T/C 26,500.00		4-23-42	United States	do	4-23-42 Loss			x	American		268,404.13
Derwent	Derwent Transportation Co	48847		9-13-48		159,950.00 (Misc.) 15,180.00	175,130.00	M B/B 1,200.00		12-28-44	do	Barge		9-26-42	x		do		175,130.00
Dolly C	Carey Davis Tug & Barge Co	48585		3-15-48		74,280.00 30,006.00	104,286.00	D B/B 25.00		3-14-44	do	Tug		2-7-43	x		do		104,286.00
Dona Aurora	The De La Roma Steamship Co		134-158 (S. D. N. Y.)	12-22-44	1,960,000.00	(Misc.) 790,000.00	2,750,000.00				Philippine	Dry cargo	Loss	4-1-42	x		Philippine	1,000,000.00	1,750,000.00
Duluth	Great Lakes Transit Corp	48713		6-18-48		(Misc.) 407.42	407.42			9-22-42	United States	do	6-24-42		x		American		407.42
Edward Chambers	do	48713		do		(Misc.) 974.31	974.31			do	do	do	7-22-42		x		do		974.31
Elizabeth	A. H. Bull Steamship Co., Inc		130-340 (S. D. N. Y.)	4-29-44		27,846.28 (Misc.) 5,028.13	32,874.41	M T/C 38,851.68		4-30-42	do	do	Loss	4-30-42	x		do		32,874.41
Do	do		131-68 (S. D. N. Y.)	5-19-44	1,500,000.00	10,604.01	1,510,604.01	523,437.00 Ins. Binder		5-5-42	do	do	do	4-20-42	x		do	492,920.00	1,017,684.01
Ellenor	do		130-338 (S. D. N. Y.)	4-29-44		32,050.68 (Misc.) 232,139.05	264,189.13	M B/B 6,500.00		4-25-42	do	do		4-25-42	x		do		264,189.13
Elna	Johannes Ramselius, et al	48538		2-2-48	187,500.00	23,352.21 (Misc.) 8,881.06	219,733.27	Title B/B 147,700.00		7-23-45	do	do	Loss	6-12-42	x		do	100,000.00	119,733.27
Emilia	A. H. Bull Steamship Co., Inc		132-292 (S. D. N. Y.)	8-31-44		12,729.77 (Misc.) 258,457.78	271,187.55	M T/C 34,780.00 M B/B 9,472.00		8-3-42	do	do		8-3-42	x		do		271,187.55
Etolin	Alaska Packers Association	46975		4-22-46	1,000,000.00		1,000,000.00	642,000.00		11-27-43	do	Combination	9-18-42		x		do	481,500.00	518,500.00
Eversilda	Gerda Eckert, as temporary administratrix, Estate of Fr. Grauds.		139-75 (S. D. N. Y.)	10-22-45	394,800.00	(Misc.) 17,700.00 (Misc.) 14,906.62	412,500.00	394,800.00		12-4-41	Latvian	Dry cargo	Loss	12-4-41		x	Latvian	394,800.00	17,700.00
Empire State	Illinois Atlantic Corp		134-374 (S. D. N. Y.)	1-26-45		33,696.40	48,603.02	M B/B 2,666.40		1-2-43	United States	do		1-2-43	x		American		48,603.02
Fred W. Sargent	Great Lakes Transit Corp	48713		6-18-48		(Misc.) 2,748.43	2,748.43	50¢ D. W. T. Charter Hire		7-31-43	do	do		12-4-42	x		do		2,748.43
Fidra	Rederiaktiebolaget Edsfors	48373		12-18-47	360,076.12		360,076.12	149,845.00		12-17-45	Finnish	do	12-27-41			x	Finnish	149,845.00	210,231.12
Fleetwood	Nicholson Transit Co	48020		10-27-47	300,000.00		300,000.00	40,000.00		3-24-45	United States	do	6-17-42		x		American	30,000.00	270,000.00
Florence Olsen	Oliver J. Olson & Co	48649		4-29-48	250,000.00	36,250.00 (Misc.) 4,413.50	290,663.50	132,902.43		8-8-46	do	do	9-28-42		x		do		290,663.50
Fordham	The City of New York	48778		8-4-48		3,500.00 (Misc.) 2,750.00	6,250.00				do	Ferry	1-6-45		x		do		6,250.00
Galen L. Stone	Eastern Steamship Lines Inc	46810		1-15-46	145,000.00		145,000.00	46,010.31		6-3-44	do	Lighter	4-28-42		x		do	34,307.73	110,492.27
George D. Dixon	Great Lakes Transit Corp	48713		6-18-48		(Misc.) 387.32	387.32				do	Dry cargo	12-11-42		x		do		387.32
George Washington	Eastern Steamship Lines Inc		1228 (D. Mass.)	4-5-46	1,739,872.00		1,739,872.00	667,500.00		10-29-45	do	Passenger	10-30-44		x		do	500,625.00	1,239,247.00
Geromi	James S. Kemper	47150		7-2-46	50,000.00		50,000.00	20,000.00		6-11-45	do	Yacht	8-27-42		x		do	15,000.00	35,000.00
J. E. Gorman	Great Lakes Transit Corp	48713		6-18-48		(Misc.) 1,241.19	1,241.19			9-22-42	do	Dry cargo	7-21-42		x		do		1,241.19
Governor John Lind	Baltimore Insular Lines, Inc		131-116 (S. D. N. Y.)	5-24-44		138,944.55 (Misc.) 227,892.99	366,837.54	M T/C 25,500.00 M B/B 6,375.00		5-9-42	do	Combination		5-9-42	x		do		366,837.54
Green Mountain	States Marine Corp. & Federal Marine Corp		131-335 (S. D. N. Y.)	7-7-44		210,845.38 (Misc.) 28,164.19	239,009.57	M B/B 10,480.00		1-3-42	do	Dry cargo		1-3-42		x	do		239,009.57
Do	do	47812		8-8-47		340,658.71	340,658.71	M B/B 10,480.00		1-3-42	do	do		1-3-42	x		do		340,658.71
Hawaiian Merchant	Matson Navigation Co		24059 R (N. D. Calif.)	4-28-44		213,199.47	213,199.47	M T/C 63,393.00		1-30-46	do	do	4-15-43	4-7-42	x		do		213,199.47
Hawaiian Planter	do		24059 R (N. D. Calif.)	4-28-44		172,918.78	172,918.78	M T/C 65,930.00		1-30-46	do	do	2-16-43	4-13-42	x		do		172,918.78
H. A. Scrandrett	Great Lakes Transit Corp	48713		6-18-48		(Misc.) 1,038.30	1,038.30			9-22-42	do	do	7-21-42		x		do		1,038.30
Hawaiian	American Hawaiian Steamship Corp	48758		7-27-48		1,612,168.68	1,612,168.68	M T/C 40,205.00 M B/B 12,108.80		5-25-42 7-7-43	do	do		5-25-42		x	do		1,612,168.68
Helen	A. H. Bull Steamship Co		130-340 (S. D. N. Y.)	4-29-44		583,471.45 (Misc.) 211,079.72	794,551.17	M B/B 9,978.67		4-16-42	do	do		4-16-42	x		do		794,551.17
Herman Winter	Seatrade Corp	48698		6-3-48	200,000.00	6,000.00	206,000.00	13,000.00		5-27-48	do	do	6-24-42		x		do		206,000.00
Hilton	A. H. Bull Steamship Co		130-340 (S. D. N. Y.)	4-29-44		869,531.61 (Misc.) 268,135.70	1,137,667.31	M B/B 14,319.63		4-16-42	do	do		4-16-42		x	do		1,137,667.31
Honolulan	American Hawaiian Steamship Corp	48721		6-24-48	1,423,500.00	(Misc.) 16,290.85	1,439,790.85	826,897.00		11-13-44	do	do	Loss	1-26-42		x	do	620,172.75 Int. 8,697.62	819,618.10
Do	do		131-343 (S. D. N. Y.)	7-9-44	1,095,000.00		1,095,000.00	826,897.00		11-13-44	do	do	do	1-26-42		x	do	620,172.75 Int. 8,697.62	474,827.25
Humrick	Daniel C. Robinson Inc	46250		11-13-44		159,670.00	159,670.00	(Not the owner)			do	Tug		9-25-42	x		do		159,670.00
Hygrade No. 8	Tanker Hygrade No. 8, Inc	48263		11-26-47	85,000.00		85,000.00	58,468.34		12-8-42	do	Tank-barge	10-24-42		x		do	43,851.26	41,148.74
International	Smith-Douglas, Inc	46289		1-19-45	723,000.00		723,000.00	236,018.78		7-27-44	do	Dry cargo	10-6-43		x		do	177,014.67	545,985.33
J. M. Davis	Great Lakes Transit Co	48713		6-18-48		(Misc.) 707.25	707.25				do	do	7-21-42		x		do		707.25
Jamaica	The City of New York	48778		8-4-48		26,875.00 (Misc.) 10,750.00	37,625.00				do	Ferry		11-4-42	x		do		37,625.00
Jean	A. H. Bull Steamship Co		131-306 (S. D. N. Y.)	6-30-44		B/B 47,357.92 (Misc.) 290,218.07	337,575.99	M B/B 9,510.40		6-9-42	do	Dry cargo		6-9-42	x		do		337,575.99
John Cadwalader	Ericsson Line, Inc	48749		7-21-48	500,000.00		500,000.00				do	Combination	7-22-42		x		do		500,000.00
Koura	Kouran Laiva O/Y	48573		3-5-48	1,200,000.00	178,026.41 (Misc.) 10,225.07	1,388,251.48	115,875.00		12-17-45	Finnish	Dry cargo	3-7-42			x	Finnish	115,875.00	1,272,376.48
Kurikka	Vaasan Laiva O/Y	48432		12-31-47	1,045,822.64		1,045,822.64	113,689.00		do	do	do	12-27-41			x	do	113,689.00	932,133.64
Kuurtanes	Kuurtanes O/Y	48433		12-31-47	1,051,269.60		1,051,269.60	117,000.00		do	do	do	12-27-41			x	do	117,060.00	934,209.60
Lake Farge	Daniel C. Robinson, Inc	46250		11-13-44		190,772.00	190,772.00	D B/B 60.00		10-14-42	United States	Barge		10-14-42	x		United States		190,772.00
Lake Frumet	do	46250		11-13-14		146,244.35	146,244.35	D B/B 60.00		9-30-42	do	do		9-30-42	x		do		146,244.35
La Paz	Tropical Shipping Co	48639		4-22-48	1,500,000.00	(Misc.) 25,000.00	1,525,000.00				do	Dry cargo	10-14-42		x		do		1,525,000.00
Lighter M & G	James B. Rendle Co. Inc		1403 (D. Mass.)	7-16-47		10,000.00	10,000.00	D 20.00 Geheral release			do	Lighter		6-2-42	x		American		10,000.00
Lone Star	States Marine Corp		131-336	7-7-44		152,550.80	152,550.80	M B/B 10,240.60		5-8-42	do								

Appendix E

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John Ericsson	Ericsson Line, Inc	48449		7- 1-48	[illegible]			[illegible]				do	Combination	7-22-42		x		do		500,000.00
Kouru	Kouran Laiva O/Y	48573		3- 5-48	1,200,000.00		178,026.41	1,388,251.48		115,875.00		12-17-45	Finnish	Dry cargo	3- 7-42		x	Finnish	115,875.00	1,272,376.48
						(Misc.)	10,225.07													
Kurikka	Vaasan Laiva O/Y	48432		12-31-47	1,045,822.64			1,045,822.64		113,689.00		do	do	do	12-27-41		x	do	113,689.00	932,133.64
Kuurtanes	Kuurtanes O/Y	48433		12-31-47	1,051,269.60			1,951,269.60		117,000.00		do	do	do	12-27-41		x	do	117,000.00	934,269.60
Lake Farge	Daniel C. Robinson, Inc	46250		11-13-44			190,772.00	190,772.00		D B/B 60.00		10-14-42	United States	Barge		10-14-42	x	United States		190,772.00
Lake Frumet	do	46250		11-13-14			146,244.35	146,244.35		D B/B 60.00		9-30-42	do	do		9-30-42	x	do		146,244.35
La Paz	Tropical Shipping Co	48639		4-22-48	1,500,000.00			1,525,000.00					do	Dry cargo	10-14-42		x	do		1,525,000.00
						(Misc.)	25,000.00													
Lighter M & G	James B. Rendle Co. Inc		1403 (D. Mass.)	7-16-47			10,000.00	10,000.00		D 20.00 General release			do	Lighter		6- 2-42	x	American		10,000.00
Lone Star	States Marine Corp		131-336 (S. D. N. Y.)	7- 7-44			152,550.80	152,550.80		M B/B 10,240.00		5- 8-42	do	Dry cargo		5- 8-42	x	do		152,550.80
Do	do	47811		8- 8-47			324,882.96	324,882.96		M B/B 10,240.00		do	do	do		5- 8-42	x	do		324,882.96
Louise	Michael N. Cavalliotis	47324		8-30-46	150,000.00			150,000.00		45,000.00		12-20-43	do	Purse seine	10-17-42		x	do	33,750.00	116,250.00
Lundby	Aktieselskabet Motortramp	47750		7-10-47	1,425,688.05			1,125,688.05		352,710.60		12-17-45	Danish	Dry cargo	7-12-41		x	Danish	50,000.00	1,075,688.05
Lucinda Clark	Waterways Transportation Inc	46313		2-19-45			37,600.00	37,600.00		13,500.00 Plus return of vessel		11-26-43	United States	Tug	11-19-42 Converted to use			American	13,500.00	24,100.00
Mac Arthur	Richard S. Cors	46796		1- 3-46	20,000.00			20,000.00		9,000.00		7-14-44	do	do	10-15-42		x	do	6,750.00	13,250.00
Maitland No. 1	Toronto, Hamilton & Buffalo Navigation Co	46435		5-15-45	766,128.00			766,128.00		72,500.00		4-17-43	do	Car ferry	8-20-42		x	do	54,375.00	711,753.00
Manos	Matson Navigation Co		24141 S	8- 4-44			19,759.85	26,842.74		M, T/C 39,043.81		1-30-46	do	Passenger		2-16-42	x	do		26,842.74
						(Misc.)	7,082.89													
Marina	A. H. Bull Steamship Co		147-201 (S. D. N. Y.)	1-16-47	2,038,000.00			2,284,792.70					do	Dry cargo	4-24-46		x	do		2,284,792.70
						(Misc.)	246,792.70													
Marisa Thorden	Aktiebolaget Roslagen, Gustaf B. Thorden, etc	48434		12-31-47	1,418,434.61			1,418,434.61		349,280.00		12-17-45	Finnish	do	12-27-41		x	Finnish	349,280.00	1,069,154.61
Marjory	A. H. Bull Steamship Co		130-338 (S. D. N. Y.)	4-29-44			145,742.25	336,251.01		M B/B 4,295.90		4-28-42	United States	do	4-28-42		x	American		336,251.01
						(Misc.)	190,508.76													
Maude M. Morey	Israel Jacobson	48273		12- 1-47	25,000.00			25,000.00		700.00		10-26-44	do	Schooner	2-18-42		x	do	525.00	24,475.00
Marsala	Oliver Bohld	48711		6-16-48	50,000.00	(Misc.)	1,250.00	51,250.00		950.00		12- 4-42	do	Bark	6-30-42		x	do		51,250.00
Mauna Loa	Walter Hilmore Keene	48583		3-10-48	125,000.00			125,000.00		8,000.00		3- 1-45	do	Dry cargo	7-12-42		x	do		125,000.00
Mayflower	William G. Broadfort, Jr., etc	47091		6- 1-46	200,000.00			200,000.00		12,670.00		12-17-43	do	Yacht	6-27-42		x	do		200,000.00
Mizpah	Eugene F. McDonald, Jr	45876		5-20-43	435,750.00			435,750.00		116,000.00		2-17-43	do	do	3-16-42		x	do	87,000.00	348,750.00
Montanan	American-Hawaiian Steamship Co		133-112 (S. D. N. Y.)	10- 9-44	949,000.00															
						(Misc.)	46,278.87	995,278.87		236,538.00		11-13-44	do	Dry cargo		11- 2-41	Loss	x	do	477,403.50	517,875.37
Monroe	A. H. Bull Steamship Co. Inc		131-306 (S. D. N. Y.)	6-30-44			43,495.95	309,421.48		M B/B 11,392.00		6- 4-42	do	do		6- 4-42	x	do		309,424.48
						(Misc.)	265,928.53													
Monterey	Jack Conrad Anderson	48603		3-19-48	90,000.00			90,000.00		None			do	Passenger		7-13-42	x	do		90,000.00
Naushon	New England Steamship Co	47537		12- 5-46	850,000.00			870,000.00		410,000.00		4-21-45	do	Dry Cargo	7- 9-42		x	do	275,000.00	575,000.00
New Bedford	New England Steamship Co	47537		do	600,000.00			600,000.00		240,000.00		4-21-45	do	do	8- 4-42		x	do	170,000.00	430,000.00
Nellie Juan	Copper River Packing Co	48829		9- 1-48			34,050.00	44,738.01		BB 18.63D		5-13-43	do	Tug		9- 7-42	x	do		44,738.01
						(Misc.)	10,688.01													
Neptune	Tyee Pudget Sound Tug & Barge Co	48586		3-15-48			90,675.00	100,355.00		B/B 100.00D		4-19-44	do	do		7-23-43	x	do		100,355.00
							9,680.00													
Nevadan	American-Hawaiian Steamship Co	48720		6-21-48	1,307,150.00			1,307,150.00		608,899.00		11-13-44	do	Dry cargo	1-17-43	3-17-42	x	do	456,674.25	850,475.75
North Sea	Northland Transportation Co		15209 (W. D. Wash.)	5-13-48	1,297,000.00			1,297,000.00				5-29-42	do	Passenger		5-29-42	x	Loss	do	1,297,000.00
No name (uncompleted yacht)	Walter B. Guy	48914		11- 5-48	56,000.00			56,000.00		7,000.00		12-22-42	do	Yacht	11-16-42		x	do		56,000.00
Octorara	Sand Products Corp	48756		7-28-48	1,003,333.33			1,003,333.33		25,000.00		9-19-44	do	Dry cargo	7-28-42		x	do		1,003,333.33
Olivia	Redenaktrbvlaget Olinebank	48425		12-30-47	500,689.95			500,689.95		86,019.00		12-17-45	Finnish	do	12-27-41		x	Finnish	86,019.00	414,670.95
Ontario	Tugboat Ontario Inc	48848		9-13-48			193,200.00	202,059.50		M B/B 2,000.00		3-10-44	United States	Tug		9-24-42	x	American		202,059.50
						(Misc.)	8,859.50													
Oregonian	American-Hawaiian Steamship Co	48773	132-352	8- 3-48	1,233,700.00	(Misc.)	20,541.06	1,254,241.06		703,209.00		11-13-44	do	Dry cargo		11- 8-41	Loss	x	do	527,406.25 (Int. 6,405.37)	726,834.81
Do	do		(S. D. N. Y.)	9-12-44	959,000.00	(Misc.)	23,328.32	982,328.32		703,209.00		11-13-44	do	do		11- 8-41	Loss	x	do	527,406.25 (Int. 6,405.37)	[2] 454,922.07
Olympia	Akteselskabet Dampskibsselskabet Orient	47751		7-10-47	1,340,289.62			1,340,289.62		603,284.00		12-17-45	Danish	do	7-12-41		x	Danish	100,000.00	1,240,289.62
Pandia	Rederi A/B Pandia	48426		12-30-47	557,761.32			557,761.32		86,342.00		12-17-45	Finnish	do	12-27-41		x	Finnish	86,342.00	471,419.32
P. E. Crowley	Great Lakes Transit Corp	48713		6-18-48		(Misc.)	534.92	534.92					United States	do	6-21-42		x	American		534.92
Portmar	Calmar SS Corp	48509		1-19-48	900,000.00			900,000.00		None			do	do	11-17-42		x	do		900,000.00
Do	do		129-295 (S. D. N. Y.)	2-11-44			346,000.00	596,000.00		M T/C 40,420.00		11-20-41	do	do		11-20-41	x	do		596,000.00
						(Misc.)	250,000.00													
President Warfield	Baltimore Steam Packet Co	47088		6-11-46	1,934,905.00			1,934,905.00		525,000.00		6-29-45	do	Passenger	7-12-42		x	do	393,750.00	1,541,155.00
Retriever	The Puget Sound Tug & Barge Co	48587		3-15-48			21,525.00	21,525.00		D B/B35.00		3-14-44	do	Tug	9-21-42		x	do		21,525.00
Robert E. Lee	Eastern Steamship Line, Inc	48748		7-20-48	1,870,290.00	(Misc.)	387.50	1,870,677.50		807,500.00		6-24-46	do	Passenger	6- 3-42 Loss		x	do	605,625.00 (Int. 13,850.55)	[1] 1,265,052.50
Do	do		1070 (D. Mass.)	7-11-44	1,870,290.00	(Misc.)	387.50	1870,677.50		807,500.00		6-24-46	do	do	6- 3-42 Loss		x	do	605,625.00 (Int. 13,850.55)	[1] 1,265,052.50
Spikes	A. J. Huch, exec		2796 (D. Minn.)	8-10-48	10,000.00			10,000.00					do	Yacht	8-10-42		x	do		10,000.00
Robert Henjes	Helen K. Henjes and Edmund F. Bowen	47416		10-30-46	91,900.00			91,900.00		51,781.00		5-17-43	do	Tug	8- 1-42		x	do	38,835.75	53,964.25
Rockaway	The City of New York	48778		8- 4-48			26,000	36,150.00					do	Ferry		11- 4-42	x	do		36,150.00
						(Misc.)	10,150													
Sable (ex-Greater Buffalo)	Detroit & Cleveland Navigation Co	48774		8- 3-48	7,283,570.00	(Misc.)	65,000	7,348,570.00			108,503.76 and return of vessel.	4-15-48	do	Passenger	8-10-42		x	do		7,348,570.00
Saimaa	Suomen Hoyrylaiva Osakeyhtio-Finska Angfartygs	48427		12-30-47	623,766.16			623,766.16		120,750.00		12-17-45	Finnish	Dry cargo	12-27-41		x	Finnish	120,750.00	503,016.16
Scows Nos. 106 and 107	American Dredging Co	48633		4-21-48	150,000.00			150,000.00		None			United States	Scows	1-16-43		x	American		150,000.00
Sea Lion	The Shipowners and Merchants Tugboat Co	48550		2-11-48	125,000.00			125,000.00		25,000.00		8-18-44	do	Tug	11-23-42		x	do		125,000.00
Sea Ranger	do	48550		2-11-48	125,000.00			125,000.00		25,000.00		8-18-44	do	do	2-23-43		x	do		125,000.00
ST. 654 ex-Tyone	Fred F. Peterson		4266-4267 (D. Alaska)	9-27-46	16,012.75		7,987.50	24,000.25		8,017.00 (title)		5-11-44	do	do	6-16-43		x	do	6,012.75	17,987.50
State of Virginia	Baltimore Steam Packet Co	47090		6-11-46	1,498,060.00			1,498,060.00		400,000.00		6-29-45	do	Passenger	4- 1-42		x	do	308,515.07	1,189,544.93
State of Maryland	do	47087		6-11-46	1,448,274.00			1,448,274.00		400,000.00		6-29-45	do	do	4- 2-42		x	do	308,507.88	1,139,766.12
Susana	Vicente Madrigal		47-612 (S. D. N. Y.)	10-13-48			9,613.86	9,613.86		M T/C 39,151.10			do	Dry cargo	Loss	4-30-42	x	do		9,613.86
State of Delaware	Wilson Line, Inc	5486		7-21-45	642,068.00			642,068.00		275,000.00		11- 2-44	do	Passenger	3-25-13		x	do	206,250.00	435,818.00
Sysonby (ex-Maret)	Estonian State Cargo and Passenger Steamship Line	47862		8-22-47	302,500.00			302,500.00					Estonian	Dry cargo	9-16-41		x	Estonian	25,000.00	277,500.00
Steel Pier	Massachusetts Steamship Lines, Inc	48781		8- 6-48			13,500.00	25,150.00		M 150.00		4-27-43	United States	Passenger		8- 7-42	x	American		25,150.00
						(Misc.)	11,650.00													
Stuyvesant	The City of New York	48778		8- 4-48			26,875.00	36,825.00		None			do	Ferry	11- 4-42		x	do		36,825.00
						(Misc.)	9,950.00													
Thomas E. Moran	Ira S. Bushey & Sons	48262		11-26-47	425,000.00			425,000.00		320,000.00		5- 3-44	do	Tug	9-13-43		x	do	240,000.00	185,000.00
Utica	Great Lakes Transit Corp	48713		6-18-48		(Misc.)	2,257.13	2,257.13		50¢ a d. w. t.		7-31-43	do	Dry cargo		12-11-42	x	do		2,257.13
Victory Sword	Sword Line, Inc		137-266 (S. D. N. Y.)	7-21-45			88,392.97	90,247.29		776.00		4-18-45	do	do	2- 9-44		x	do		90,247.29
						(Misc.)	1,854.32													
Virginia	National Bulk Carriers, Inc	48656		5- 6-48	3,584,000.00			3,584,000.00		2,100,339.00		9-23-44	do	Tanker	5-12-42	Loss	x	do	1,265,609.88	2,318,390.12
Waimea	Matson Navigation Co		24059-R (N. D. Calif.)	4-28-44			228,328.44	228,328.44		M T/C 35,235.00		4-15-42	do	Dry cargo	4-15-42		x	do		228,328.44
Washington Square	The City of New York	48778		8- 4-48	200,040.00	(Misc.)	40.00	200,040.00		None			do	Ferry	8-17-42		x	do		200,040.00
Waukesha	Waukesha Transportation Co., Inc	48849		9-13-48			173,200.00	197,148.25		D B/B 32.00		8-13-42	do	Barge		8-13-42	x	do		197,148.25
						(Misc.)	23,898.25													
Western Sword	Sword Line, Inc		138-282 (S. D. N. Y.)	9-29-45			165,028.13	165,028.13		M T/C 27,300.00 M B/B 4,756.00	4- 9-48	7-31-42	do	Dry cargo		7-31-42 TC 2-22-43 BB	x	do		165,028.13
Wichita Falls	Southern Steamship Co		153 of 1944 (E. D. Pa.)	10-13-44			351,036	351,036		M B/B 4,973.01		10-14-42	do	do	10-14-42		x	do	70,893.49	280,142.51
William C. Atwater	Fall River Navigation Co	48508		1-14-48	419,000.00			419,000.00		14,000.00		6- 3-44	do	do	10-27-43		x	do	10,500.00	408,500.00
William C. McTarnahan	National Bulk Carriers, Inc		1568 (D. Del.)	5-11-44	2,612,696.04			2,612,696.04		1,619,591.07		1-18-43	do	Tanker	7-21-42		x	do	1,214,693.20 (Int. 12,696.04)	[3] 1,398,002.84
Do	do	48655		5- 6-48	2,273,502.61			2,273,502.61		1,619,591.07		1-18-43	do	do	7-21-42		x	do	1,214,693.20 (Int. 12,696.04)	1,058,809.41
Wind Rush	Shepard & Morse Lumber Co	47803		8- 5-47	582,090.00	(Misc.)	40,817.12	622,817.12		377,621.16		8-30-46	do	Dry cargo	2- 3-45		x	do	216,000.00	406,817.12
Wipunen	Jenny Ja Antti Wihurin Rahasto	48428		12-31-47	1,260,000.00			1,260,000.00		197,032.00		12-17-45	Finnish	do	12-27-41		x	Finnish	197,032.00	1,062,968.00
W. J. Conners	Great Lakes Transit Corp	48713		6-18-48		(Misc.)	436.50	436.50				9-22-42	United States	do	6-20-42		x	American		436.50
Wolverine	States Marine Corp		131-334 (S. D. N. Y.)	7- 7-44			342,092.91	342,092.91		M B/B 10,000.00		5-16-42	do	do		5-16-42	x	do		342,092.91
Do	do	47811		8- 8-47			342,092.91	342,092.91		M B/B 10,000.00		5-16-42	do	do		5-16-42	x	do		342,092.91
W. W. Atterbury	Great Lakes Transit Corp	48713		6-18-48		(Misc.)	732.54	732.54				9-22-42	do	do	7-26-42		x	do		732.54
Yorktown	Baltimore Steam Packet Co	47089		6-11-46	1,237,134.00			1,237,134.00		425,000.00		6-29-45	do	Passenger	7-13-42		x	do	327,010.21	910,123.79
Yukon	Alaska Steamship Co		15068 (W. D. Wash)	5-23-46	1,500,000.00			1,500,000.00					do	do	5-31-42		x	do		1,500,000.00
Zephyr (Ex-Charlie Watson)	R. T. C. No. Eleven Corp	47347		9-25-46	581,000.00			581,000.00		275,000.00		7- 9-45	do	Tanker	7- 2-42		x	do	206,260.64	374,739.36
Zebedee E. Cliff	Israel Jacobson	48273		12- 1-47	25,000.00			25,000.00		1,000.00		10-26-44	do	Schooner	2-18-42		x	do	750.00	24,250.00

TOTAL CLAIMS

Title	$83,219,461.01
Use	$10,723,633.01
Miscellaneous	4,080,839.24
Total	$98,023,933.26

Total payments on account and balance of petitioners' claims: $18,718,572.43 $79,305,360.83

LEGEND

TC—Time charter.
BB—Bareboat charter.
D—Daily charter rate.
M—Monthly charter rate.
[1] This amount is subject to adjustment in the cost.
[2] 250,000 of this amount subject to court decision.
[3] 2 amounts are shown as paid while actually only one payment has been made but petition in each court reflects payment on account.

817110—48

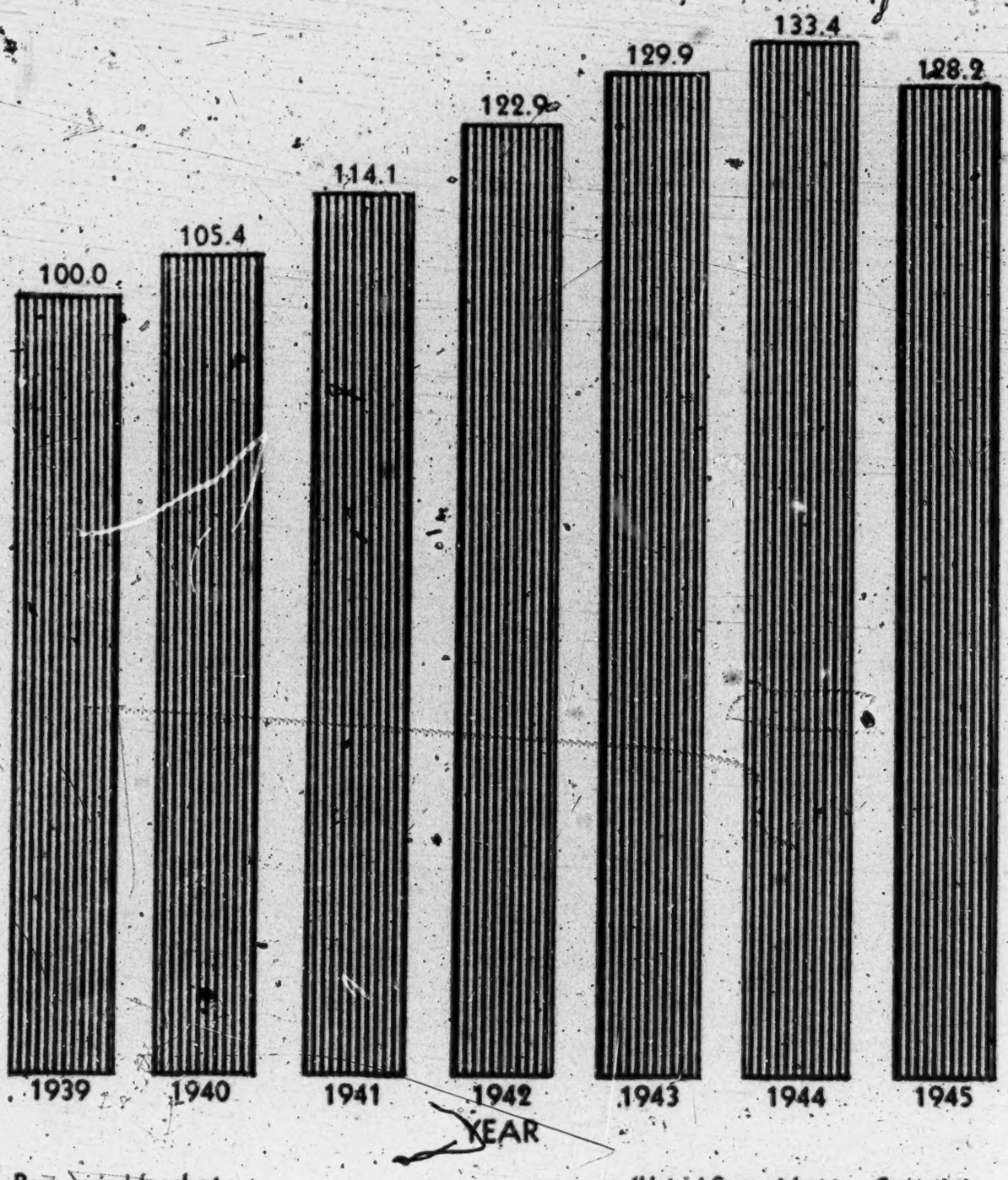
Just compensation claims reduced to judgment (as of December 13, 1948)

Name of vessel	Caption of case	Court	Date decided
Astrea	Edna A. Boudreaux et al. v. United States	U. S. Dist. Ct. for the E. Dist. of La., New Orleans Div.	5- 6-45
Cheerio	Shain E. Baitary v. United States	U. S. Dist. Ct. for the E. Dist. of S. C., Charleston Div.	11-28-44
Dountless	Frank Y. MacFarland v. United States	U. S. Dist. Ct. for the S. Dist. of Maine	11-26-43
Geo. Washington	Eastern Steamship Lines, Inc v. United States	U. S. Dist. Ct. for the Dist. of Mass. (now on appeal)	12-11-47
Hourless	William W. Wilson v. United States	U. S. Dist. Ct. for the Dist. of Mass.	11-12-43
Mariner	Charles Zubik v. United States	U. S. Dist. Ct. for the W. Dist. of Pa.	6-22-45
Mary Kay	Hugo Menke v. United States	U. S. Dist. Ct. for the N. Dist. of Calif., Southern Div.	7-21-[illegible]
N. G. Arfaras	John E. Green and F. Kaustsasmailon v. United States	U. S. Dist. Ct. for the S. Dist. of Fla.	7-45
Norfolk	Baxton Lines, Inc. (165 F. 2d. 993) v. United States	U. S. Dist. Ct. for the E. Dist. of Va., Norfolk Div.—U. S. Ct. of Appeals (Fourth Circuit) affirmed.	4- 4-47 5- 4-48
Off Duty	Victor F. Sheronas and William H. Faulk v. United States	U. S. Dist. Ct. for the Dist. of Delaware	8-46
P. Kremasco	John E. Green v. United States	U. S. Dist. Ct. for the S. Dist. of Fla.	7-45
Stella Maris	C. B. Brunson v. United States	U. S. Dist. Ct. for the S. Dist. of Calif., Central Div.	10-30-44
Virginia	National Bulk Carriers, Inc. (169 F. 2d 943) v. United States	U. S. Dist. Ct., Dist. of Del.—U. S. Circuit Ct. of Appeals (Third Circuit) affirmed.	2- 5-47 10- 8-48
Zoric	Robert Chapot v. United States	U. S. Dist. Ct. for the E. Dist. of La., New Orleans Div.	5-11-45
Gene	Lillian Kendall, Executrix of the Estate of Eugene H. Kendall Deceased (108 C. Cls. 497) v. United States.	U. S. Ct. of Claims, Claim No. 46199	4- 7-47
Geoanna	Seven-up Bottling Co. of Los Angeles (107 C. Cls. 402, cert. denied) v. United States.	U. S. Ct. of Claims Claim No. 45868	12- 2-46
Governor Cobb	Trailerships, Inc. (106 C. Cls. 215) v. United States	U. S. Ct. of Claims, Claim No. 45923	4- 1-46
International	Smith-Douglass Co., Inc. v. United States	U. S. Ct. of Claims, Claim No. 46289	12- 6-48
MacArthur	Richard S. Cors (110 C. Cls. 66) v. United States	U. S. Ct. of Claims, Claim No. 46796	1- 5-48
Maitland No. 1	The Toronto Hamilton & Buffalo Navigation Co. v. United States.	U. S. Ct. of Claims, Claim No. 46435	12- 6-48
Pacific	Edward Leslie Turkinton & Mrs. Elaine Horton Turkinton (108 C. Cls. 571) v. United States	U. S. Ct. of Claims, Claim No. 46273	5- 5-47
State of Delaware	Wilson Line, Inc. v. United States	U. S. Ct. of Claims, Claim No. 46484	6-28-48

APPENDIX F

(Vickery Scale)

*(Estimated Rise in Shipbuilding Costs for Cargo Vessels and Tankers)



Base period for chart is the first nine months in 1939.

(United States Maritime Commission, Technical Department, Cost Division, April 21, 1942)

817110°—48

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No. 132

In the Supreme Court of the United States

October Term, 1947

THE UNITED STATES, PETITIONER

v.

RICHARD S. GOE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, PETITIONER

v.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO RESPONDENT'S SUGGESTION OF DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI TO CORRECT SAME

The United States opposes the granting of respondent's motion to correct the alleged diminution of the record.

1. The suggestion and motion are untimely and should not be received.

The Government's petition for a writ of certiorari, and the certified transcript of the record, were filed in this Court on June 29, 1948. The

record was printed by July 9, 1948, and service thereof, as well as of the petition, was made on counsel for respondent on July 17 and 19, 1948. The petition was granted on October 11, 1948. The United States served its brief on the merits, which is based on the record as certified and printed, upon counsel for respondent on December 22, 1948.[1] We have been informed by the Clerk that the case is set for argument during the session of the Court which commences on January 31, 1949. The brief for respondent has not yet been served on the United States.

At least since August 20, 1948, when respondent's brief in opposition to the petition for a writ of certiorari was received by petitioner, respondent's counsel has included, among others, the firm of Covington, Burling, Rublee, Acheson & Shorb, as appears on the face of respondent's brief in opposition (cover, p. 21). In addition, that firm filed a brief *amicus curiae* in this case when it was pending before the Court of Claims (R. 5, 14), and a representative of that firm presented oral argument in that court (R. 5).

Petitioner received no intimation or suggestion that the record, as certified and printed, was unsatisfactory to counsel for respondent, or that it omitted any matter considered material to the issues placed before this Court by the granting of

---

[1]Appendices D, E, F (which were separately printed) were served on December 27, 1948.

the petition for a writ of certiorari, until the afternoon of January 7, 1949. Petitioner has founded its argument on the record now before the Court.

We submit that the motion is most untimely, under Rule 17 of the Rules of this Court, which requires that such motions be filed "not later than the first motion day after the expiration of sixty days from the printing of the record [July 9, 1948, herein], unless for special cause shown the Court receives the motion at a later time." No special cause has been shown for receiving it at this very late date.

2. The present record contains all matter relevant to the errors assigned by the United States and to the questions presented to this Court by the petition for a writ of certiorari.

a. The Government's petition and brief present only issues of the interpretation and unconstitutionality of a portion—the so-called "enhancement" clause—of Section 902 of the Merchant Marine Act, 1936, as amended, which concerns the requisition of and just compensation for merchant vessels during the war. No challenge has been made to the Special Findings of Fact of the Court of Claims; the Government's position is that, on the basis of those findings, the Court of Claims misapplied and misconstrued the statute in refusing to deduct certain enhancement which it found to have occurred. In particular, the Government

has not raised before this Court the correctness of the lower court's finding that the current "market value" of the brig *MacArthur*—the requisitioned vessel here involved—at the time and place of taking was $15,500 (R. 12). Nor has respondent cross-petitioned for a writ of certiorari, alleging that the Court of Claims' award was too low, or that its findings of fact were erroneous. In these circumstances, the testimony before the Court of Claims, upon which it based its findings of fact, are plainly not material to the errors assigned or to the questions presented to this Court.

The Act of May 22, 1939, 53 Stat. 752, which first authorized the bringing up of the evidence before the Court of Claims, provides that the testimony which is brought up must be "material to the errors assigned." Where the petitioner does not raise issues concerning the correctness of the Court of Claims' findings of fact, but presents only questions of law, that statute does not contemplate any right in the respondent to bring up the evidence, either in support or in contradiction of the Court of Claims' findings, unless he files a cross-petition for a writ of certiorari. Accordingly, Rule 99 of the Court of Claims (set forth in the Appendix) provides for the certifying of testimony or evidence only in case the *petitioner* requests more than the pleadings, findings of fact, conclusions of law, judgment, and opinion of the Court of Claims.

b. The evidence which respondent now seeks to include in the record consists almost entirely of testimony concerning *offers* of $18,000 and $17,500 for the *MacArthur* prior to its requisition. Respondent does not indicate why he considers this testimony material, but, even if it were competent evidence of value, it would go only to show that the Court of Claims' finding of a current "market value" of $15,000—which we do not contest—is too low. But respondent has not challenged that finding by cross-petition, and the transcript of testimony before the Court of Claims contains other competent evidence which the lower court credited and upon which its finding was based (R. 14).

If respondent is to be permitted, at this stage, to add such testimony to the record, there will be injected into the case factual contentions which are not rightly present and which are not material to the errors assigned and the questions raised by the petition. Fairness would require that the United States be permitted the opportunity to examine the testimony below and to bring up other portions of the testimony bearing upon the parts respondent now seeks to add, as well as opportunity to recast its argument on the basis of the additional material. The character of the controversy might well be materially changed from one over important issues of law to one involving the correctness of the findings of specific facts in this par-

ticular case, an issue which certainly could not have induced this Court to grant the Government's petition for certiorari. And as the record now stands, respondent cannot properly claim that he is prejudiced in any way, on the issues presented to this Court by the Government's petition in this case.

For these reasons, it is respectfully submitted that the motion be denied.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1949

Rule 99 of the Rules of the Court of Claims provides:

Application for Transcript of Record

99. Upon the rendition of final judgment in any case it shall be the duty of the clerk to furnish a certified transcript of the record in said case to the plaintiff or his attorney of record, or to the Assistant Attorney General, upon written application therefor stating that the plaintiff or the United States, as the case may be, intends to file a petition without unnecessary delay for a writ of certiorari. The clerk shall notify the adverse party or his attorney of record of the application for such writ.

(a) Whenever a certified transcript of the record is requested by the plaintiff or his attorney of record, or by the Assistant Attorney General, for the purpose of filing a petition for a writ of certiorari in the Supreme Court, and the plaintiff or defendant desires not only the pleadings, findings of fact, conclusion of law, judgment and opinion of the court but also "other parts of the record as are material to the errors assigned," the party making the request for the record shall file with the court, not more than forty-five (45) days after judgment has been entered, a copy of the petition for the writ of certiorari and an original and five (5) copies of such parts of the record as, in his judgment, are material to the errors assigned, and serve upon the opposing counsel

a copy of the same at the same time it is filed in the court.

Unless the parties can agree as to the parts of the evidence in the record which are material to the errors assigned, then counsel for the party so objecting shall, within ten (10) days from the date of the filing in the court and service upon him of the above record, file with the clerk of the court an original and five (5) copies of such parts of the evidence as he considers should become part of the record to be certified, and at the same time serve upon the appellant's attorney a copy thereof. The court will then settle the record to be certified.

"See Rule 41 of the Supreme Court as amended March 25, 1940, and Supreme Court General Equity Rules."

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No. 132

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

THE UNITED STATES, *Petitioner*,

v.

RICHARD S. CORS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) is reported in 75 F. Supp. 235.

JURISDICTION

The judgment of the court below was entered on January 5, 1948. (R. 18) A motion for a new trial was denied on April 5, 1948. (R. 18) The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

Is there any useful purpose to be served by this Court's reviewing the decision of the Court of Claims when

1. The point at issue is not new, but only a renewed attempt to secure approval of an old contention many times rejected by this Court,

2. There is no conflict on the point at issue amongst the lower courts, and

3. Adoption of the substantive position advocated by the Petitioner would:

I. Impute to the Congress the capricious intent to require the courts to deprive owners of ships requisitioned under one statute of that measure of compensation expressly guaranteed to owners of property generally (including ships) requisitioned under other statutes at the same time in effect.

II. Require construction of the statute in question in a manner inconsistent with the accepted law laid down by this Court.

III. Violate the Constitution and contradict decisions of this Court as recent as *United States v. Petty Motor Company* (327 U. S. 372 (1946)).

IV. Undermine the principles of international law insisted upon by our country for the protection of American property abroad, if applied to those of the ships taken from nationals of friendly countries for which Petitioner asks this Court to make this little case the test.

V. Most pertinent of all,—not change the outcome in this case.

STATUTE INVOLVED

The relevant provisions of the Merchant Marine Act of 1936 as amended (53 Stat. 1254, 46 U. S. C. §1242), are set forth at pages 29 to 32 of the Petition.

STATEMENT

Respondent was the owner of the steam tug MACARTHUR, which on October 15th, 1942 was requisitioned by the War Shipping Administration pursuant to Section 902(a) of the Merchant Marine Act of 1936. (R. 10)

The vessel in question is described in the findings of the Court of Claims. (R. 5, 6) She was constructed with a charcoal iron hull and had been well maintained during ownership by the United States Coast Guard until March 19, 1942, when she was purchased by Respondent. After acquisition from the Government, Respondent, with four helpers, made extensive repairs and improvements and had further work performed by a shipyard at Portland, Maine. Although he expended $5,699.78, the court found that "The amount would have been substantially greater had all of the work been performed by a shipyard at the abnormally high rates being charged at that time." (R. 9) On April 21, 1942 a Certificate of Enrollment and License was granted Respondent to operate the vessel in the coasting trade for the period of one year. (R. 9) However, on or before October 15, 1942, Petitioner (who had seven months before sold the vessel to Respondent), evidently changed its mind about needing her and requisitioned her on that date through the War Shipping Administration.

It is not disputed that at the time the MACARTHUR was taken her fair market value for the general uses to

which she could be put was the $15,500 awarded. (R. 12; Petition 8, 9) As a result of the combined operation of three factors, this market value at the time of requisition was found by the Commissioner, at Petitioner's request, to be $5,000 higher than that which prevailed on September 8, 1939. The three factors were: 1) "the demand for vessels which followed the outbreak of war in Europe"; 2) "the Government's need for vessels, which necessitated the taking of many vessels"; and 3) "the great increase in shipping and in harbor traffic which occurred during the period of the war." (R. 12-13) Together they occasioned a "general rise in the market values of nearly all vessels in and about the Port of New York." (R. 12) There is no allocation of any part of the $5,000 increase to any of these three factors.

The $5,000 by which the vessel's market value in October 1942 exceeded her market value in September 1939 is the so-called "enhancement" that Petitioner sought to have deducted from the award of just compensation. The lower court found that the fair market value of the vessel at the time of taking was $15,500 and that Respondent was entitled to such value at that time. Petitioner's contention that Congress meant to require the court to award less than the market value at the time of taking was rejected.

Petitioner sought a rehearing. Petitioner did not then, nor does it now, contend that the value was less than that found by the lower court. Its contention was and is that the court was obliged by statute to award less.

REASONS FOR DENYING THE WRIT

Petitioner's argument is in effect as follows:

1. The lower court erred in holding that the "enhancement clause" in Section 902(a) of the Merchant

Marine Act was not intended by Congress to lay down a rule binding upon the courts. (Petition 12-17)

2. The lower court erred in construing the "enhancement clause" so as to make it consistent with the constitutional requirements heretofore stated by this Court. (Petition 19-25)

3. The construction of the "enhancement clause" urged by Petitioner, though going beyond any holding of this Court, is constitutional. (Petition 17, 18, 26)

4. The facts of this case fairly test these questions for pending cases involving requisitioned ships, foreign as well as domestic. (The Petition leaves this to inference)

Petitioner does not contend that the lower court departed from the decisions of this Court or that its holdings are in conflict with those of any other lower court. It does not because it cannot.[1]

The Petition, it will be noted, allocates its discussion amongst these points in inverse ratio to their significance. The Court of Claims, to be sure, did find that the Congress did not intend to usurp the judicial function of determining what compensation is required under the Fifth Amendment; but this was not necessary to its decision. The decision below was that on the facts

[1] The only conflict known to Respondent is within the administration itself and is a matter of public record. For instance, the State Department, concerned over the effect of the position now advocated by Petitioner on ships owned by nationals of friendly countries, submitted a legal memorandum to the effect that payment of less than market value at the time of taking violated international law. (House Merchant Marine and Fisheries Committee Document 20, pp. 167-173) The Comptroller General replied that he was not disposed to question this, but that the remedy lay with a forum other than the General Accounting Office. (House Merchant Marine and Fisheries Committee Document 20, p. 184).

of this case Petitioner failed to prove that the award for Respondent's tug included any "enhancement" which can be excluded in time of war or peace from the just compensation owing under the Constitution.

I

PETITIONER'S CONSTRUCTION OF THE "ENHANCEMENT CLAUSE."

Petitioner concedes that the $15,500 award of the lower court is equal to the price that would have been paid for the vessel at the time of taking by "other potential purchasers." (Petition 9, note 4) Petitioner does not deny that the $15,500 awarded is consistent with the holdings of this Court that such market value at the time of taking is the primary measure of that just compensation required by the Fifth Amendment. Petitioner nevertheless asserts that the "enhancement clause" requires the courts to award less than the market value at the time of taking. Petitioner contends that the ambiguous language of the "enhancement clause" leaves the courts no choice but to assume a Congressional intent to deny to the owners of ships requisitioned under the Merchant Marine Act the market value of their ships when taken. Petitioner adds that this Congressional intent is such as to impel this Court to exclude from the award to Respondent up to $5,000, or one third, of his vessel's market value.

This contention necessarily imputes to the Congress the intent to discriminate against shipowners, domestic and foreign, by exacting from them a disproportionate

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* By Public Law 101, 77th Congress (55 Stat. 242, 50 U. S. C. App. §§ 1271-1272), compensation to be paid for foreign-owned ships requisitioned by the United States was to be determined in accordance with "the applicable provisions of Section 902."

contribution to the cost of making war. No "enhancement clause" or anything comparable to it appears in any other United States requisitioning statute. Both the General Requisitioning Act of October 16, 1941[3] and the Act of October 10, 1940[4] (authorizing the requisitioning of war material destined for export) require the payment of true just compensation. The former statute expressly requires compensation to be determined "in accordance with the provision for just compensation in the fifth amendment," and the latter makes specific reference to market value as the measure of just compensation. The uniform result of the decisions under these statutes is to award property owners as just compensation the market price at the time of taking, without deduction for any supposed "enhancement."

There is no question but that Respondent would be awarded as just compensation the amount others would have paid for his property if, instead of a ship, that property had been bronze castings,[5] textile machinery,[6] brass piping,[7] a leasehold,[8] pork products,[9] or any of the other types of property the United States requi-

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[3] 55 Stat. 742, 50 U. S. C. App. §§ 721-724, as amended, 56 Stat. 176, 181, 50 U. S. C. App. § 636.

[4] 54 Stat. 1090, 50 U. S. C. App. §§ 711-713.

[5] Graves v. United States, 62 F. Supp. 231 (W. D. N. Y. 1945).

[6] Boras Wafveri Aktiebolag v. United States, 71 F. Supp. 740 (Ct. Cl. 1947).

[7] Lessner Plumbing & Heating Co. v. United States, 64 F. Supp. 931 (S. D. N. Y. 1945).

[8] United States v. Petty Motor Co., 327 U. S. 372 (1946). *Cf.* United States v. General Motors Corp., 323 U. S. 373 (1945).

[9] United States v. John J. Felin & Co., 68 Sup. Ct. 1238 (1948).

sitioned during the war (or even the very ship in question if the War Department had requisitioned her) under one or the other of the statutes cited above. Less than three years ago, in *United States v. Petty Motor Co.*, this Court described the plaintiff's right to recovery for a leasehold requisitioned in wartime in the following explicit language:

> "The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that *just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value'.* It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with *general demand for the property,* evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings." (Italics added)[10]

So far as we are aware, no one has successfully contended that this language is an incorrect statement of the law as applied to ships or other property; nor that any sum in the nature of "enhancement" should be deducted from the market value of property requisitioned during the war—even though the value of leaseholds and most other kinds of property increased substantially from causes directly or indirectly related to the war. On the contrary, in the *Petty Motor* case, Petitioner itself argued that the market value of the prop-

[10] 327 U. S. 372, 377-378 (1946).

perty when taken was the question to be determined by this Court.[11]

Certainly it is plain that the shipowner who has lost his ship is in exactly the position of the tenant who has lost his lease. Each of them has lost a capital asset that may be the basis of his livelihood; each of them is forced to pay market prices for the things he buys in wartime; each of them may equitably expect that the Government do the same. It would require the most explicit statutory language to support the conclusion that Congress intended to pay the tenant what his leasehold would bring in the open market at the time of taking and to pay the shipowner no more than his ship would have brought in the open market three years before she was taken. (It will be recalled that the $5,000 Petitioner seeks to deduct represents increase in general market value between September 8, 1939 and October 15, 1942, the date the MacArthur was taken).

II

The "Enhancement Clause" Properly Construed, is Consistent with the Decisions of this Court.

To reject, as the lower court did, a construction that would require unjust discrimination does not leave the "enhancement clause" without meaning. Being ambiguous, it is susceptible of interpretation consistent with the accepted law of this Court. A glance at Section 902(a) of the Merchant Marine Act discloses that it should be read as declaratory of concepts inherent in the judicial application of "just compensation." For example, Section 902(a) provides that "the owner shall

[11] See the summary of Petitioner's brief printed with the report of the *Petty Motor* case contained in 90 L. Ed. 729, 730.

not be paid for any consequential damages arising from a taking . . . of property under authority of this section." Nothing is better settled in our law than that consequential damages for the taking of property are not recoverable. (See *United States v. Petty Motor Co., supra*)

The "enhancement clause," read judiciously, is only another Congressional expression of existing case law. This law allows nothing above the market value for general uses, *i.e.*, it excludes enhancement over the market attributable to ~~the~~ need of the Government for a use peculiar to it which is therefore not available to or desired by potential purchasers generally. In still other words, just compensation is not value to the particular taker, but an amount equal to general market value. An example of the application of this rule appears in *Olson v. United States*, 292 U. S. 246 (1934), cited at page 24 of the Petition. There the plaintiff was denied compensation for *the special value to the Government* of "flowage" rights on the condemned land which could not have been so used by the plaintiff *or any other private owner*. Such value is of course not reflected in market price. (Petitioner, be it noted, does not suggest that the $15,500 market value of the MacArthur reflected any special value to the Government.)

United States v. Miller, 317 U. S. 369 (1943), also cited in the Petition, is a refinement on the *Olson* case. The facts there were these: In August, 1937, Congress authorized a reclamation project that necessitated the relocation of a railroad right of way. For this, alternate routes had been laid out and staked, one of them over plaintiffs' land. It was then foreseeable that the plaintiffs' land would probably be taken. Actual condemnation proceedings against plaintiffs' land were

not begun until December, 1938, at which time land values in the general area had enhanced *solely* by reason of the Government project.

This Court found that plaintiffs' property was definitely earmarked for probable taking by August, 1937, and held that the court below did not err in excluding evidence of "increment of value *due to the initiation of the project*" and arising after August 26, 1937." (p. 373) The language is the trial court's; the italics are this Court's. In its footnote (6) this Court said the Circuit Court erred in construing the quoted language to exclude "*any increment in value* after August 26, 1937." Again the italics are this Court's.

This Court's test of excludable enhancement in the *Miller* case, therefore, is (1) whether the Government is definitely committed to a project involving a taking of the specific property in question and (2) whether the value of plaintiff's property increased *solely* because it is known that it is "probably within the scope of the project."

The Government did not initiate at any time during the war a "project" of taking for title the whole or even a large part of the United States Merchant Marine. By far the greater number of the ships that were requisitioned were taken for use;[12] and a substantial number of such ships were not taken at all. In no sense,

[12] A taking "for use" was in effect a compulsory bare-boat charter or rental for the duration, with the owner usually employed at a profit as a "general agent" to manage *his* ships for the Government, with the right to carry adequate insurance against sinking—a very different thing from separating the owner permanently from his capital asset with compensation restricted, as Petitioner contends, to less than the vessel could be sold for had the owner wanted to part with his means of gaining a livelihood.

therefore, could the Government's general wartime "need" of vessels be considered a "project" within the meaning of the *Miller* case. Much less could the passage of the Merchant Marine Act of 1936 be seriously considered such a "project," as Petitioner indeed acknowledges in the weakness of its suggestion that such passage indicated that at some indefinite future time the Government "might well" have to requisition "many" ships. (Petition 25)

The lengths to which Petitioner goes in an effort to bring this case within the *Miller* case confesses an appreciation that its contention must stand or fall on that case. For the sake of its argument, we will assume (against reason) that the Government's "need" in 1942 was equivalent to a "project." The rule of the *Miller* case requires Petitioner to prove *in addition:* (1) that it was known on the date after which further market increases, attributable to this "project," constitute deductible enhancement, that it was reasonably probable the MacArthur would be requisitioned, and (2) that this prospect of requisition did, in fact, cause the "enhancement" that the Petitioner seeks to deduct from the $15,500 of general market value. On the facts of this case such proof is demonstrably impossible. The market to which Petitioner would restrict the Respondent was of a date prior to March 19, 1942, when Respondent purchased the vessel from the Government. At the date of purchase, and long after that, Respondent and any other ordinary person would have every reason to believe that the vessel in question was outside the scope of the so-called "project." Under any rule of common sense, Respondent was the one person who had every reason to believe that Petitioner had no use for the vessel, else it would not so readily

have sold her after it entered the war. Furthermore, there is nothing in the record to substantiate Petitioner's inference that the prospect of requisition did, in fact, have anything whatsoever to do with the market for the MACARTHUR at the time she was taken. On the contrary, it was specifically found that "Prior to the time defendant [Petitioner] requisitioned the *MacArthur* there was no reasonable prospect that she would be requisitioned, and no part of the enhancement in her value was due to such a prospect." (R. 13)

The cases cited by Petitioner for the proposition that current market value is not the true measure of just compensation do not sustain its position:

Bauman v. Ross, 167 U. S. 548 (1897), does not support any deduction from fair market value; on the contrary, it holds only that if a benefit is conferred on a property owner by the Government he may be required to pay for it.

In *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266 (1943), not one penny was deducted from market value. The property owner in that case asserted that its land was worth more than the market price, contending that the owner's power of eminent domain, conferred by the state, would enable it to combine the land which it owned with numerous pieces of land to form a large power development. Since the general public did not have the landowner's right of eminent domain, the landowner could not have secured from the public the price above the market it asserted was the proper measure of compensation.

Petitioner's misreading of *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53 (1913), is, if possible, more striking. Here the landowner was awarded the general market value of his property, but

excepted to the award on the ground that it did not include the sum of $15,000, said to be the "strategic" value of the property. In the nature of things this "strategic" value was one which only the Government could have utilized. There was no buyer except the taker who would have considered it in making a purchase. This Court properly excluded from the award any payment for such over-the-market value, saying (at page 80):

> "That the property may have to the public a *greater value than its fair market value* affords no just criterion for estimating what the owner should receive." (Italics added)

For the Petitioner to characterize these cases as permitting awards of just compensation in a sum less than the market, *i.e.*, less than the owners could have secured "from private persons for their own use," is a departure from the facts, from the holdings, and from the express statements in the opinions cited. In fact the only cases which permit the award as just compensation of a sum less than market value are those such as the *Olson* and *Miller* cases discussed above.

Petitioner contends that the authority of Congress to prescribe a more restrictive method of compensation than that allowed by the courts "flows not only from the Fifth Amendment and the general federal eminent domain power, but even more importantly from the Government's war power." (Petition 26) The argument runs that if Congress has the full right to protect the nation against war profiteering it has the right to prescribe a measure of compensation for certain property taken that is less than that paid for other property taken and less than the amount that the courts have con-

sistently held does not constitute profit, but only the *minimum* necessary to make the owner whole. Petitioner's contention that the war powers to prevent profiteering have an important bearing demonstrates a confusion that is entirely unwarranted. The very cases that Petitioner cites contrast these two very different powers—the curbing of profits and the taking of property.

In *Lichter v. United States*, 68 Sup. Ct. 1294 (1948) (Petition 26), Mr. Justice Burton said:

> "The recovery by the Government of excessive profits received or receivable upon war contracts is in the nature of the regulation of maximum prices under war contracts or the collection of excess profits taxes, rather than the requisitioning or condemnation of private property for public use." (At p. 1317)

and in *Bowles v. Willingham*, 321 U. S. 503 (1944), a rent-ceiling case, (Petition 26) Mr. Justice Douglas said:

> "We are not dealing here with a situation which involves a 'taking' of property." (At p. 517)

The Petition does not make allowance for the fact that the owner of the MacArthur was subject, like all other Americans, to all of the legislation designed to curb wartime profiteering and to assure that each contribute to the war effort according to his means. Petitioner seeks on top of this to impose on the owners of ships whose capital assets were taken from them an additional contribution not required to be made by others whose property the Government needed.

Not only does Petitioner impute to the Congress the intent so to discriminate, but devotes five pages of the

Petition to contending that the Congress intended this lower measure of value to be obligatory upon the courts. (Petition 12-17) The statement of the lower court that Congress did not mean to have the Courts apply one measure to make certain owners whole and a lesser measure for other owners was not necessary to the court's decision. If, on the other hand, as Petitioner contends, the Congress did intend to bind the Court of Claims and this Court to such different measures of compensation, the lower court and this Court would be equally compelled to find the legislation, so construed, to be invalid.

III

Petitioner's Construction of the "Enhancement Clause" Would Violate the Constitution.

The defining of "just compensation" under the Fifth Amendment is a judicial, not a legislative function. Petitioner admits that this is a correct statement of the law, as expressed in the leading case of *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893). (Petitjon 21) It asks this Court to "discard" or, at least, to "qualify" the principle that the *Monongahela* case expresses because passage of Section 902 shows "purposeful adoption" by Congress of the "enhancement clause." (Petition 21) It is not clear why "purposeful adoption" makes valid a law that would be unconstitutional if unintended.

The fact that the *Monongahela* case has been undisputed law for fifty years is not a reason for changing it, as Petitioner would seem to urge. It is good law and should remain the law because it takes account of the fact that the power to requisition property is one of the most peremptory of the powers a government can

exercise. The taking cannot be resisted, nor can the owner later recover consequential—but none the less real—damages. He is limited to "just compensation." If the very authority that makes the decision to take the property could also determine by being purposeful enough what shall be paid for it, the owner would have no protection against arbitrary exercise of this tremendous power. For this very reason, the basic law of the land includes the guaranty of the Fifth Amendment; otherwise Congress would in a real sense act both as advocate and judge in its own cause. If a man's livelihood could be taken away and recompensed at the rate the taker chose to offer, every man's livelihood would exist at the purposeful pleasure of the Government. This is why the *Monongahela* case is as valid and persuasive today as it ever was.

IV

Petitioner's Construction of the Enhancement Clause, As Applied to Foreign-Owned Vessels, Would Violate International Law.

The first reason assigned by Petitioner for granting the requested writ is that "there are now about seventy suits . . . for the taking of merchant vessels . . . and in almost all of these cases the judicial application of the 'enhancement' clause would materially affect the awards." (Petition 11-12) This Court is left to assume that this case fairly tests the principle for the other seventy suits. It becomes necessary, therefore, to inform this Court that a substantial number of the seventy suits involve ships taken from the nations of friendly countries.

Petitioner's contention, if applied to vessels of friendly foreigners, would violate the principles of in-

ternational law upheld by this country and, indeed, insisted upon by it for the protection of American property abroad. On April 16, 1943, Secretary of State Hull forwarded to the War Shipping Administration "a memorandum setting forth important considerations which it is believed should be taken into account in connection with the settlement of the claims of the Danish owners." The Secretary of State continued:

> "While the matter is of importance from the standpoint of the international responsibility of this Government with respect to the properties of nationals of foreign countries, it is also of importance from the point of view of the expropriation by foreign governments of extensive properties of American nationals in foreign countries, whose interests we must keep in mind."

The memorandum stated that in the testimony leading to the enactment of the statute under which foreign ships were taken (and which adopted the "applicable" provisions of Section 902(a)) "the Department had in mind, of course, the payment of 'just compensation' as heretofore determined by both municipal and international tribunals."

The memorandum went on to cite decisions of this Court and of international tribunals to the effect that for compensation to be just, it must be the market value at the time of taking. The memorandum concluded:

> "It is not believed that either the language of the statute in question or its legislative history indicates that it was intended to be in disregard of established international law in relation to the payment of 'just compensation' as interpreted and applied by international tribunals."

The foregoing is a matter of public record. The above quotations are from House Merchant Marine and Fisheries Committee Document 20, pp. 167, 169, 173.

V

The Law Hitherto Established by This Court Makes the Present Case Moot.

All of the questions presented by the Petition should be reserved, if heard at all, to another case where Petitioner's contentions fit the facts. While it is sought to be argued that the Court of Claims' decision is principally premised upon its statement that the enhancement clause of Section 902(a) is not binding upon it, a reading of its opinion discloses that careful consideration was given to the proper construction of that Section and its constitutionality under settled principles laid down by this Court, assuming that Section 902(a) was meant to bind the courts.

The principal question and error assigned to the lower court's decision is moot, since there was no showing of any enhancement of any kind in the market during the seven months Petitioner owned the MacArthur. Respondent picked up at a public sale a vessel Petitioner did not want, repaired and improved her and could have sold her, had he wanted, for the price the court awarded. Petitioner's elaborate contentions are not sound, but in any event they do not fit this case.

It is to be noted that Petitioner is unable to give this Court a clear statement of the circumstances giving rise to the alleged enhancement in the value of the MacArthur and the measure of that enhancement in dollars and cents. It merely says that "*If* the 'enhancement' clause should properly be considered in the mak-

ing of the judicial award, some, at least, of this enhancement must be eliminated." (Petition 27) Petitioner's case falls because its proofs have failed. The evidence before the court convincingly demonstrated that there was nothing properly deductible from the fair market value at the time of taking, which was held to be the measure of just compensation to which Respondent is entitled.

CONCLUSION

Petitioner asks this Court to review the decision of the Court of Claims in such a way that the Respondent will ultimately receive in lieu of just compensation for his tugboat an amount lower than the price he could have sold her for when she was taken, though the owners of other types of requisitioned property receive that price.

On its face, therefore, the Petition asks this Court to promulgate an unreasonable construction of a statute and thereby to become a party to an unjust discrimination against Respondent individually and against shipowners as a class. It makes this request on the basis of presumed Congressional "intent" to practice such discrimination, neglecting to consider that such an intent, if unequivocally expressed in legislation, would invalidate the enactment.

The decision of the Court of Claims was correct and no useful purpose can be served by this Court's review. It gives to Section 902 of the Merchant Marine Act of 1936 a reasonable interpretation which avoids discrimination and which brings the operation of the statute into line with both judicial concepts of just compensation and the current practice of Petitioner under parallel statutes. It gives effect to the facts in the Record.

It is respectfully submitted that these considerations should persuade this Court to deny the writ prayed for.

Respectfully submitted,

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HAROLD A. KERTZ,
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MAHAR & MASON,
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Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1948

No. 132

THE UNITED STATES, *Petitioner*

v.

RICHARD S. CORS

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

A SUGGESTION OF DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI TO CORRECT SAME

RICHARD S. CORS,
By COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Of Counsel

Supreme Court of the United States

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Comes now Richard S. Cors, Respondent in the above-entitled matter, and respectfully shows to the Court as follows:

1. On June 29, 1948, Petitioner in the above-entitled matter filed its petition for a writ of certiorari to the Court of Claims and, at the same time, filed a transcript of record to accompany said petition. Previous to said filing Petitioner had requested the Clerk of the Court of Claims of the United States to furnish a certified transcript of the record. Said request did not include

any "other parts of the record as are material to the errors assigned" as provided in Rule 99 (a) of said Court but included only the pleadings, findings of fact, conclusions of law, judgment and opinion of the court, motion for new trial and the denial thereof.

2. More than 60 days after the filing of the said record with this Court Respondent retained additional counsel to represent him before this Court.

3. Said additional counsel have advised Respondent that certain matters included in the transcript of testimony taken in the Court of Claims, and considered by said Court in entering the judgment here under review, are by them considered material to the issues placed before this Court by the granting of the petition for certiorari by this Court on October 11, 1948. Said material matters are as follows:

Extracts from Testimony before the Court of Claims in No. 46796, Richard S. Cors v. The United States.

* * * * *

Direct examination of John A. Mowbray, a witness produced on behalf of the plaintiff.

Transcript page 141

7Q. Did you at any time in the year 1942 have occasion to visit the tug MAC ARTHUR at New York?

A. Yes, sir, I did.

8Q. In what month?

A. It was in June of 1942.

9Q. Where was she?

A. She was on one of the piers in the East River.

10Q. What was the purpose of your visit to her?

A. With the idea of purchase.

Transcript page 143

23Q. Did you form an opinion, as a practical operator and owner, of the market value of the MAC ARTHUR as of the time when you saw her, based on your inspection of her?

A. I made an offer for the purchase of her at that time.

Transcript page 144

THE WITNESS: At that time I valued her at $18,000. and made an offer of $18,000. for the vessel.

BY MR. MASON:

26Q. That offer was rejected, was it not?

A. That is correct.

Cross-examination of John A. Mowbray.

Transcript page 151

69RXQ. Are you prepared to state what this boat would have been worth in 1939?

A. No, I would not. During the time when there was a demand and we needed the vessel, to us she was worth the price that we offered for her.

70RXQ. And it was because of the demand that you offered $18,000.?

A. That is correct, sir.

* * * * *

73RXQ. Is it not a fact that you offered $18,000. because of the scarcity of vessels in 1942 due to the fact that the Government had taken over practically all small craft as of that date?

Transcript page 152

THE WITNESS: There was plenty of small craft in New York Harbor at the time, and I wanted a boat so that I could have it when I wanted to move it and I did not want to pay a lot of money for it.

Cross-examination of Edmond J. Moran, a witness produced on behalf of the defendant.

Transcript page 210

251XQ. In this particular case, do you recall that you had before you a photostat of an offer which Mr. Cors had received from Emory Sexton & Company of $17,500.?

A. Do I—? What was that?

MR. MASON: Read that back, please.

(251XQ read by the reporter.)

THE WITNESS: Yes, I saw the copy of the offer.

252XQ. Did you give it any consideration in your appraisal?

A. No, sir.

* * * * * *

4. Said additional counsel were not retained by Respondent until after expiration of the period set forth in Rule 17 of this Court for the filing of motions for a writ of certiorari to correct diminution of the record. For this special cause shown Respondent respectfully prays that this Court should receive this motion as permitted by said Rule 17.

WHEREFORE Respondent moves the Court for a writ of certiorari to correct the said diminution of the record in the above-entitled matter.

RICHARD S. CORS,

By COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,

Of Counsel

DISTRICT OF COLUMBIA, *ss:*

John Lord O'Brian, being duly sworn deposes and says:

I am a member of the firm of Covington, Burling, Rublee, Acheson & Shorb, of counsel in the above-entitled matter. I have read the foregoing motion and know the contents thereof and I am informed and verily believe that the statements therein contained are true.

(Signed) JOHN LORD O'BRIAN.

Subscribed and sworn to before me this 13th day of January, 1949.

MARGARET MACPHERSON,
Notary Public.

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Supreme Court of the United States

OCTOBER TERM 1948

No. 132

THE UNITED STATES, *Petitioner*

v.

RICHARD S. CORS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT, RICHARD S. CORS

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Supreme Court of the United States

OCTOBER TERM 1948

No. 132

THE UNITED STATES, *Petitioner*

v.

RICHARD S. CORS, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE RESPONDENT, RICHARD S. CORS

OPINION BELOW

The opinion of the Court of Claims (R. 13-18) is reported at 110 Ct. Cl. 66.

JURISDICTION

Judgment for respondent (plaintiff below) was entered by the Court of Claims on January 5, 1948 (R. 18). A motion of petitioner (defendant below) for a new trial was overruled on April 5, 1948 (R. 18). The petition for a writ of certiorari was granted by this Court on October 11, 1948. The jurisdiction of this Court rests upon the provisions of Section 3 (b) of the Act of February 13, 1925, as amended (now repealed), and upon 28 U. S. C. 1255 (1).

STATUTE INVOLVED

This suit involves Section 902 of the Merchant Marine Act, 1936, as amended in 1939, 46 U. S. C. 1242. The pertinent portions of this section of the Act are set forth in Appendix A to petitioner's brief, pages 129, 132.

STATEMENT

Respondent was the owner of a tugboat, the *MacArthur*, which was requisitioned by the War Shipping Administration on October 15, 1942, pursuant to the authority of the Merchant Marine Act of 1936, as amended. Not being satisfied with the amount offered for the *MacArthur* by the War Shipping Administration, the respondent, in accordance with the provisions of the Act, was paid 75 per cent of the amount offered, and instituted suit in the Court of Claims for the balance claimed to be due as representing just compensation (R. 1-4).

The pertinent facts found by the Court of Claims are as follows:

The *MacArthur*, then named the *Guthrie*, was built in 1895 at Baltimore, Maryland, for the United States Coast Guard, and thereafter was continuously owned by the United States until March, 1942. Until November 1939 the vessel was stationed in Baltimore harbor and used by the Coast Guard as a boarding tender or tug to transport immigration, customs and health officers from the port to vessels arriving in the harbor (R. 5, 6). In the latter part of 1939 the *Guthrie* was transferred from Baltimore harbor to the Coast Guard base at Portland, Maine, and thereafter a special Board of Survey was appointed by the Coast Guard to ascertain the condition of the vessel and make recom-

mendations regarding her disposition or repair. On September 13, 1941, the Board concluded that "under normal conditions and, considering the age of the vessel, the expense of putting this vessel in operating condition would not be justifiable and that the vessel should be placed out of commission . . ." (R. 7, 8). The Board continued, however, in its recommendations, that "due to the present emergency and the great need of vessels, it is believed that necessary repairs should be made . . .". If such repairs should have been made, it was the view of the Board "that three or four years satisfactory service could be had from this vessel" (R. 8).

Notwithstanding this recommendation, Coast Guard headquarters directed that the *Guthrie* be sold. The sale was conducted as an open market transaction, and on March 19, 1942, the respondent, being the highest bidder, acquired the *Guthrie* from the United States for the sum of $2,875 (R. 8). Thereafter certain repairs and improvements were made to the vessel, part of the work being performed by the respondent and a crew of men working under his supervision, and part being performed by a shipyard at Portland, Maine. Respondent "expended a total of $5,699.78 on labor and materials, but the amount would have been substantially greater had all of the work been performed by a shipyard at the abnormally high rates being charged at that time" (R. 8, 9).

Following the completion of the repairs and improvements, the vessel was licensed by the Department of Commerce for the coasting trade. She then sailed to New York, and her name was changed from *Guthrie* to *MacArthur* (R. 9).

In September 1942 an officer of the United States Navy surveyed the *MacArthur* "for the purpose of determining

her suitability for use . . . as a 'steam heating plant' for heating and pumping' fuel oil from oil barges into combat vessels of the Navy" (R. 9).

The War Shipping Administration[1] requisitioned the *MacArthur* on October 15, 1942. After her requisition the vessel was used by the Navy for the purpose for which she had been surveyed (R. 10).

The War Shipping Administration determined the amount of $9,000 to be just compensation and offered that sum to the respondent. Upon rejection of the award by the respondent, 75 per cent of the amount awarded was paid to the respondent and suit was instituted for the balance due (R. 5).

The Court of Claims found that "the fair market value of the *MacArthur* at the time and place of the taking is the sum of $15,500" (R. 12) and judgment was ordered on the basis of that finding.

The Court of Claims further found that the combination of three conditions created a demand for and a shortage of tugs, with the result that the market value of the *MacArthur* on October 15, 1942, was $5,000 higher than that prevailing on September 8, 1939. During the intervening period there was "a general rise in the market value of nearly all ships in and about the port of New York" (R. 12, 13).

---

[1]Executive Order 9054, February 7, 1942 ("Establishing a War Shipping Administration in the Executive Office of the President and Defining Its Functions and Duties") (7 FED. REG. 837, 3 CFR (Cum. Supp. 1943) 1086-1088) transferred certain powers and functions of the Maritime Commission under the Merchant Marine Act, including those pertaining to requisition, to the War Shipping Administration. Section 202 of the Naval Appropriation Act, 1947, Act of July 8, 1946, 60 STAT. 481, 501, retransferred these powers to the Maritime Commission as of August 30, 1946.

The three specific conditions working in combination which caused this general market rise from September 1939 to October 1942 were: (1) "the demand for vessels which followed the outbreak of war in Europe"; (2) "the Government's need for vessels, which necessitated the taking of many vessels"; and (3) "the great increase in shipping and in harbor traffic which occurred during the period of the war" (R. 12, 13).

After making these findings the Court of Claims held: "Since plaintiff [respondent] could have gotten for his vessel $15,500 from private persons for their own use, he is entitled to no less from the Government" (R. 17).

The petitioner concedes that "The United States did not, and does not now, contest the finding that on October 15, 1942, respondent could have sold the vessel to other potential purchasers for $15,500" (Petitioner's Brief, p. 9).

In the course of its opinion the court reasoned that neither the case of *United States v. Miller*, 317 U. S. 369 (1943), the rules of the Advisory Board on Just Compensation,[2] nor the Merchant Marine Act of 1936, as amended, "require us to abandon or to modify in this case the standard of market value laid down by the Supreme Court" in a series of cases cited by the court (R. 17). Specific findings were made on the several requirements laid down in *United States v. Miller, supra* (R. 13, 15-17).

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[2]The rules promulgated by the Advisory Board on Just Compensation established by Executive Order 9387 of October 15, 1943, 8 FED. REG. 14105, and the rules promulgated by the Board reestablished by Executive Order 9611 of September 10, 1945, 10 FED. REG. 11637 (as amended by Executive Order 9627, September 24, 1945, 10 FED. REG. 12113), are printed in Appendices B and C to Petitioner's Brief, pp. 136 and 142.

QUESTIONS PRESENTED

Respondent's tugboat was requisitioned in October 1942 pursuant to the provisions of Section 902 of the Merchant Marine Act of 1936, as amended in 1939. That section provides, in part, that the owner "shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." The questions presented are:

1. Did not the court below properly base its decision on: the value of the vessel at the time and place of taking, excluding elements of appreciation in value heretofore excluded in judicial determinations of just compensation, *i.e.*, (a) any increase in value due to the ship's special adaptability to the owner's use, (b) any increase due to the ship's peculiar fitness for the taker's purposes, and (c) any value resulting from the probability that the vessel would be requisitioned by the Government for wartime activity?

2. Did not the court properly refuse to exclude additional elements of appreciation in value?

3. Would not an interpretation of Section 902 requiring the exclusion of elements of appreciation in value in addition to those heretofore excluded in judicial determination of just compensation give rise to serious doubt as to the validity of Section 902 under the Fifth Amendment to the Constitution?

SUMMARY OF ARGUMENT

I

Section 902(a) of the Merchant Marine Act of 1936, as amended in 1939, adopts the rule established by the

courts in determining just compensation. These rules, recently reiterated in *United States v. Miller*, 317 U. S. 369 (1943), exclude certain elements of enhancement in value in any just compensation case. Properly interpreted, Section 902(a) admonishes the administering agencies to follow these judicial standards.

This interpretation is fully supported by the legislative history. In particular, the amendments in 1939, one of which changed the words "fair actual value" to "just compensation" were specifically stated by the congressional committees to be for the purpose of making certain that the courts would not be controlled by any assumed legislative formula. The petitioner advances nothing to contradict this unequivocal declaration.

Moreover, petitioner's attempt to substitute a legislative for the prevailing judicial formula squarely conflicts with several canons of statutory construction in its interpretations of Section 902(a). Unquestionably it raises a serious constitutional question which is wholly avoided by respondent's interpretation. Second, it nullifies and emasculates portions of the section. Third, it ignores not only contemporaneous construction of the statute by the agency charged with the administration of the statute, but also the fact that that agency was the motivating factor behind the 1939 amendments explained in the committee reports.

Finally, petitioner's construction raises a serious question whether Congress could possibly have intended the vague, arbitrary and conflicting interpretations which petitioner advances. That petitioner's construction would produce unfair and unreasonable results is obvious. We cannot believe that Section 902(a) requires the courts to reach results so unreasonable and to ascribe to Congress the intent to be unfairly discriminatory and capricious.

II

The constitutional objections to petitioner's interpretations of Section 902(a) are sufficiently serious to warrant full treatment. Unquestionably existing law requires that just compensation be paid and that the courts and not the legislature are to determine the measure of that just compensation. *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893). The doctrine has been affirmed and reaffirmed on numerous occasions.

Petitioner cites nothing to the contrary. The decisions involving appeals to this Court from state court condemnation proceedings are not in conflict since in every case the statute or constitutional provision involved provided for the payment of just compensation or its equivalent. The cases held no more than that the Court could not inquire into every detail of a judicial proceeding carried through by an established court acting under an approved rule of law.

Nor is petitioner aided by its reference to material from foreign countries. Some of them have no due process or just compensation clause. In Australia, the law appears to be directly contrary to petitioner's assertion. Furthermore, respondent agrees with the State Department and the War Shipping Administration that Congress did not intend to require our Government to fail in its international responsibilities or to create a precedent which might invite expropriation of American property abroad with inadequate compensation.

III

We feel it incumbent on us to call to the Court's attention that on the facts found in this case the judgment below

should be affirmed on any construction of Section 902(a). Clearly that is true if respondent's interpretation is correct. In addition, however, it appears impossible to accept the contention that the Government could, as it did here, sell a ship at an enhanced value in March 1942, and requisition it in October 1942 at its 1939 value.

Petitioner's attempt to avoid this result by arguing that most of the enhancement occurred between March and October 1942 does not make sense. The record is barren of any evidence that the value of the ship was enhanced during those months due to any of the causes which petitioner contends are to be excluded. In fact, the record shows that it was the action of respondent in preparing, reconditioning, converting and moving the vessel which resulted in its larger value.

Moreover, there can be no doubt that even were petitioner to evolve a theory upon which its interpretations of Section 902(a) would prevail on this record, the issue is not squarely and unequivocally presented, and is not appropriate for a decision of the issues which petitioner urges. *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18, 22 (1936).

ARGUMENT

The controversy in this case revolves around the proper interpretation of Section 902 of the Merchant Marine Act of 1936, as amended in 1939, which reads in part as follows:

> "When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use."

Respondent's position can be simply stated: Congress, in enacting this section, was doing no more than instructing the administering agency to adopt the concepts established by the courts in deciding just compensation cases under the Fifth Amendment. That is the view adopted by the court below.

Petitioner's position is not only impossible of simple statement, but is far from clear. It evolves from a background of administrative conflict which has "raged," as petitioner puts it, for many years, and still goes on. Although the several administrative views are necessarily discussed more fully below, no understanding of the issue here is possible without a brief summary of that controversy.

The first construction of Section 902(a) was, obviously, by the agencies administering it—the Maritime Commission and the War Shipping Administration. They adopted the view which respondent now urges, and which the court below adopted: that the statute was a legislative mandate to pay as much, but no more, than a court would award under the Fifth Amendment. Elements of enhancement in value heretofore adopted by the courts were, of course, excluded. This view prevailed from the time the 1939 amendments became effective until November 28, 1942. See Appendices A and B, *infra*.

On this latter date, however, the Comptroller General ruled that the War Shipping Administration was permitted to pay no more than the value of vessels as of September 8, 1939 (when a limited emergency was proclaimed by the President). 22 COMP. GEN. 497. This is one of the views advocated, and perhaps the one preferred, by petitioner in this case.

As a first effort to resolve this conflict, the War Shipping Administration requested and secured an opinion from

the former Attorney General, William D. Mitchell, as to the meaning of Section 902(a). In his opinion, dated February 11, 1943, Mr. Mitchell concluded that Section 902(a) does not limit compensation for requisitioned vessels to September 1939 values. He reasoned that no enhancement occurring before the War Shipping Administration had authority to requisition could be excluded, and that May 27, 1941 was the earliest date when the Administration had such authority. It may be noted that, on petitioner's own admission (Petitioner's Brief, p. 106) domestic ships' values reached their highest in May 1941, and hence questions of enhancement since then are purely academic. Mr. Mitchell concluded[3]:

> The validity of the statute depends on whether the *courts* are left free to award full 'just compensation' undiminished by any legislative formula. Section 902(d) fairly construed, gives such a remedy in the courts." (Italics in original.)

As a resolution of the controversy, the opinion was unavailing. Consequently, in 1943, in a further effort to resolve the controversy between the Comptroller General, on the one hand, and the War Shipping Administration on the other, the President appointed an Advisory Board on Just Compensation to determine rules for the guidance of the War Shipping Administration in administering Section 902(a). Executive Order 9387, October 15 1943 (8 FED. REG. 14105, 3 CFR (Supp. 1943), ch. II, pp. 48-49). The ruling of the Advisory Board, as originally announced, did little more than restate the language of Section 902(a), but noted that it was not appropriate to use September 8, 1939 as the starting point for determining excludable in-

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[3] House Merchant Marine and Fisheries Committee Document 20, pp. 154, 157 (hereinafter cited as Document 20).

creases in value.[4] Two years later, because of inability to agree on what the Advisory Board had decided, it was reconstituted to clarify its original rules. Again the Board paraphrased the statutory language and again it disapproved of the September 8, 1939 date, without specifying a different one. In sum, the Board did not resolve the controversy. The War Shipping Administration read its rules as supporting the Administration's original position (as did the court below). The Comptroller General—and now the petitioner here—dissented.

Since the original controversy, the Department of State has expressed its accord with the original view of the War Shipping Administration, as applied to foreign vessels requisitioned under the Act of June 6, 1941, 55 STAT. 242, which incorporates by reference the applicable provisions of Section 902. See Appendix C, *infra*. Moreover, the Comptroller General has apparently somewhat modified his original views. We learn from petitioner's brief (pp. 112-113) that on November 3, 1948 (after certiorari was granted in this case) an inter-office memorandum indicated that the Comptroller General would approve an increase in awards over September 1939 values ranging

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[4] In Rule 4 the Advisory Board said:

> "In the application of this rule neither the proclamation of limited emergency of September 8, 1939, nor the facts existing at that time, are in themselves of significance. The Board does not determine whether any enhancement after May 27, 1941, other than as enumerated above as deductible, should be excluded; since the Board is advised that the value of ocean-going vessels was higher on May 27, 1941, than at the time of taking, and that any enhancement since May 27, 1941, in vessels of other types, not deductible under the foregoing, is attributable to a general rise in prices or earnings, and should therefore not be deducted" (Petitioner's Brief, pp. 139-140).

from 5 percent for 1940 to 33 percent for 1944. This rule of thumb, however, is not extended to vessels under 1,000 tons, and hence excludes the ship here involved.

As petitioner admits (Brief, pp. 125, 126), the controversy still continues. Perhaps because of that, petitioner has not, as we read its brief, adopted a position. There is no doubt that, in determining just compensation for a requisition under Section 902(a), petitioner would exclude from the value of the property at the time and place of taking some elements besides those which have been customarily excluded, in any event, by the courts. Here it sets forth two views—the Comptroller General's and its own interpretation of the Advisory Board order—and in effect requests the Court to choose between them.

That petitioner's view, or views, cannot be more simply stated or more precisely summarized we regard in itself as evidence not only of the unwisdom of departure from settled judicial doctrine, but also of the unlikelihood that petitioner correctly reflects the intention of Congress in enacting Section 902(a). With that, however, we deal below.

In our argument we first set out the established judicial doctrine, and indicate that, in every respect, Section 902(a) is no more than a summary restatement of it. Second, we show that our reading of Section 902(a) is fully supported by the legislative history of that section, and by the rules of statutory construction which are here applicable. Third, we illustrate the substantial objections which exist to any of petitioner's suggested readings of the section.

Finally, we feel it incumbent to call to the attention of the Court that, in our view, the facts in this particular case

may require an affirmance of the decision below on any reading of Section 902(a), and hence may make a decision on its proper meaning unnecessary. Logically, no doubt this point should be made first. Practically, it is difficult to make the point intelligently until the several positions have been fully explained in the course of the discussion of the question of interpretation. Consequently, and in order to meet squarely the issues raised by petitioner's brief, we have ventured to make this our concluding point.

We turn, then, to the details of the argument.

I

SECTION 902(a) OF THE MERCHANT MARINE ACT OF 1936, AS AMENDED IN 1939, ADOPTS RULES THERETOFORE ESTABLISHED BY THE COURTS IN DETERMINING JUST COMPENSATION.

A. THE LANGUAGE OF SECTION 902(a) SUPPORTS RESPONDENT'S CONSTRUCTION

Under the Fifth Amendment, just compensation must be paid when private property is taken for public use. Six years ago, in a unanimous opinion, the Court reviewed the cases which had carefully evolved the principles controlling the determination of just compensation, and said: "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U. S. 369, 373 (1943). In determining the precise indemnity to which an owner in any case is entitled, the Court there noted that "no general formula should be used for the purpose. In an effort, however, to find some practical standard the courts

early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the 'value', the 'market value', and the 'fair market value' of what is taken. The term 'fair' hardly adds anything to the phrase 'market value', which denotes what it fairly may be believed that a purchaser in fair market conditions would have given', or, more concisely, "market value fairly determined'" (p. 374).[5]

What is most important, however, is that the Court reiterated that not every element contained in the value of property at the place and time of requisition is to be included in an award. Where the property taken is especially adaptable to the owner's particular use or where the property has a peculiar fitness for the taker's purpose, such elements of value are not to be taken into consideration in determining just compensation. These limitations were made articulate at least as early as 1913 in *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53.

Moreover, when a public project is initiated and certain property expropriated, the owner of other property included within the general project is not allowed the increased value for his property when it is subsequently taken if, at the time of the initiation of the project, it was reasonably probable that such other property was included within the project. This principle was recognized at least as early as 1893 in *Shoemaker v. United States*, 147 U. S. 282.

Viewing Section 902(a) in the light of the well established judicial concepts, it appears to respondent that the congressional directive that values shall not be enhanced "by the causes necessitating the taking" does no more than

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[5]These conclusions were reaffirmed three years ago in United States v. Petty Motor Co., 327 U. S. 372, 377, 378 (1946).

incorporate the principles of the *Shoemaker* and *Chandler-Dunbar* cases. Two distinct elements of enhancement are to be excluded in determining the award for a vessel requisitioned under Section 902(a): first, the enhanced value of the property due to its peculiar fitness to the taker's purposes; and, second, the enhanced value of the property, due to a project which, at the time of its initiation, it was reasonably probable would include the particular property in question. These two elements constitute excludable special value due to "the causes necessitating the taking." And these are precisely the elements which the courts would exclude in any event.

The statute, then, is no more than an affirmation of judicial standards—a statutory expression of limitations on just compensation which the courts have evolved. Nor can that meaning be dismissed as making the language superfluous. Quite the contrary appears from the context. The last sentence of Section 902(a) provides:

> "The owner shall not be paid for any consequential damages arising from a taking or use of property under authority of this section."

This is clearly not an attempt to substitute legislative for judicial standards. *Sharp v. United States,* 191 U. S. 341 (1903); *Omnia Commercial Co. v. United States,* 261 U. S. 502 (1923). Like the enhancement clause, it was carried over from the provisions of the 1928 Merchant Marine Act. If it be "surplusage" to reiterate in a statute the limitations already worked out by the courts, then Congress twice indulged in surplusage in Section 902(a). Actually, we regard it as wholly reasonable that Congress, by summarizing judicial doctrine, should see fit to remind the

executive agency, and possibly even the courts, that just compensation excludes values special to the taker or created by the project necessitating the taking.

B. THE LEGISLATIVE HISTORY SUPPORTS RESPONDENT'S CONSTRUCTION OF SECTION 902(a).

The Merchant Marine Act of 1928 contained an enhancement clause applicable to the determination of "fair actual value" of *subsidized* vessels if later requisitioned by the Government. The 1936 Act contained in Section 902 an enhancement clause applicable to the determination of "fair actual value" of *all* vessels documented under the laws of the United States.[6] There is no indication whatever that Congress intended at that time, when it broadened the application of the section, to formulate a legislative measure for just compensation. Quite the contrary appears.[7]

In 1939, amendments to the 1936 statute were suggested by the Maritime Commission, one of these being to change the words "fair actual value" in Section 902 (a) to "just compensation." This amendment was made.[8] Such a

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[6]There was an overriding ceiling for subsidized vessels in Section 802, which has no application here, since the *MacArthur* was not subsidized.

[7]Compare Senator Copeland's vigorous denunciation of what he regarded as just such an attempt in the case of the termination of the ocean mail contracts dealt with in the 1936 Act, with the strong approval of Section 902. 80 CONG. REC. 9335, 9885, 10070-10071. (1936).

[8]Section 902 of the 1936 Act contained the following language:

> ". . . the owner shall be paid the *fair actual value* of the vessel at the time of taking or paid the just compensation for the vessel's use based upon such fair actual value . . . and in no such case shall such fair actual value be enhanced by the causes necessitating the taking." (Italics added.)

change from the inexact term "fair actual value" to the judicially exact term "just compensation" is significant on its face. That it was fundamental and decisive is disclosed by the favoring report of the House Committee on Merchant Marine and Fisheries.

The House report[9] stated:

> "A rearrangement of the language referring to determination and payment of just compensation is proposed. As stated above, the words 'fair actual' have been omitted, when speaking of 'value.' The reason for the deletion is that the committee is advised that the adjectives 'fair actual' when used in connection with 'value' are indefinite and unnecessary and serve only to suggest that some other kind of value might be used in determining the just compensation guaranteed by the Constitution when private property is taken for public use. The Supreme Court has held that the determination of just compensation is a judicial function and hence the value of property taken should be determined as a matter of fact unhampered by any formula.
>
> "The proposed changes retain the legislative direction concerning the credits that shall be allowed to the United States where the just compensation is determined and paid, such as deductions for construction subsidies and for national-defense features.

In 1939 this language was amended to read as follows:

> ". . . the owner thereof shall be paid *just compensation* for the property taken or for the use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use." (Italics added.)

[9] H. R. REP. No. 660, 76th Cong., 1st Sess., 4, 5 (1939). The Senate report (SEN. REP. No. 678, 76th Cong., 1st Sess., 4 (1939)) repeated verbatim the House report.

> The proposed changes also retain the injunction now carried in section 902 that the value of the property taken and used shall not be enhanced by the causes necessitating the taking and use."

The purpose of the amendment as thus explained by the committees of the House and Senate is crystal clear. The Congress desired that indemnification to an owner whose vessel was requisitioned should be based on the established judicial principles of compensation. Under these principles just compensation means "the full and perfect equivalent in money of the property taken," as reiterated in 1943 in *United States v. Miller*, 317 U. S. 369, 373. The congressional committees concluded that the phrase "fair actual value," as used in the Merchant Marine Act, 1936, was "indefinite and unnecessary and [might] serve only to suggest that some other kind of value might be used in determining the just compensation guaranteed by the Constitution when private property is taken for public use."

Notwithstanding the unequivocal manifestation of congressional intent contained in these committee reports, petitioner makes no mention of them, even to try to explain them away. Indeed, petitioner is driven far afield in an attempt to find something which it can cite as "legislative history." From a general concern, reflected in congressional studies and other investigations over a period of years from 1922 to 1948, with the question of excessive profits and earnings during World War I, and from a few random remarks which petitioner refers to as "some more specific inklings," it seeks to draw the conclusion that Congress intended by retaining the enhancement clause in 1939 to exclude some unspecified and apparently unspecifiable ele-

ments of value. It cites, for example, an oral statement by Senator Bailey that "the valuation is not to be on any enhanced value due to the emergency, but on the value prior to the emergency" (Brief, p. 99). We submit that reliance on a nebulous oral remark is scarcely warranted when there is available the carefully worded written report of the committee which Senator Bailey signed as chairman. Moreover, if petitioner would have Senator Bailey mean by the "emergency" the limited emergency proclaimed on September 8, 1939, then petitioner would have the Senator adopting a position more extreme, even than that of the Comptroller General, who now would allow some later enhancement. See pp. 12-13, *supra*.

Nor are the studies and investigations conducted at times before or after 1939 relevant in determining congressional intent. Reliance on any such data would exceed even the attempts condemned by the Court in *United States v. United Mine Workers*, 330 U. S. 258 (1947). The Chief Justice there denied that the meaning of the Norris-LaGuardia Act of 1932 could be determined from the legislative history of a 1943 statute. Utterances and opinions in 1943, it was ruled, were not (p. 281-2) "authoritative guides to the construction of the Norris-LaGuardia Act. They were expressed by Senators, . . . none of whom was on the Senate Judiciary Committee which reported the bill." Certainly the admonition is particularly applicable to an attempt to reach congressional intent in 1939 by reference to the Comptroller General's decision in November 1942, as petitioner appears to do.[10]

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[10]It does, however, appear to be proper, under the *United Mine Workers* case, to call attention to the fact that in 1942 the Senate Commerce Committee, the membership of which was substantially

And to rely on such "inklings" as the observations of a Congressman in 1922 who was an opponent of a particular bill, and who changed his mind and become a supporter of the 1928 Merchant Marine Act, is not an appropriate method for determining congressional intent (Petitioner's Brief, pp. 96-97). The use of such methods brings to mind the pithy warning of Mr. Justice Cardozo against disregarding the apparent purpose of Congress and inquiring into hidden motives: "Thus the process of psychoanalysis has spread to unaccustomed fields." *United States v. Constantine*, 296 U. S. 287, 299 (1935); see also *Sonzinsky v. United States*, 300 U. S. 506, 513-514 (1937).

We submit that the Court may fairly put to one side petitioner's "inklings." They do not detract in the slight-

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the same as that which passed upon the 1939 amendment, proposed a clarifying amendment to Section 902 (a) as "an affirmation of the . . . legal standards fully set forth in the numerous decisions by the Supreme Court of the United States" which the "Administrator is required to follow in determining just compensation," and "to avoid any danger that it may be construed in a manner conflicting with the fifth amendment of the Constitution." SEN. REP. No. 1813, 77th Cong., 2d Sess., 8, 9 (1942). Congress adjourned before action was taken on the omnibus bill which contained the clarifying amendment. The report just mentioned comments upon the Comptroller General's interpretation as follows:

> "Section 902(a) of the act contains language relating to enhancement of values which is ambiguous and which may be susceptible of an interpretation which might force a rolling back of prices to some earlier period, possibly even to 1939 as the Comptroller General has pointed out. It is not believed that such an extreme interpretation was intended to be applied."

Petitioner fails to mention this in connection with the argument it builds upon Senator Bailey's oral remarks quoted at page 20, *supra*, notwithstanding that the report was signed by Senator Bailey as chairman.

est from the unequivocal statements by the House and Senate committees in support of the position which respondent now takes—that Congress did *not* intend to legislate a departure from the judicial doctrines of just compensation, and that it *did* intend to make clear that those doctrines were to be applied.

C. SEVERAL RULES OF STATUTORY INTERPRETATION SUPPORT RESPONDENT'S CONSTRUCTION OF SECTION 902(a).

Not only does petitioner fail on the text and context of the statute, and on its legislative history, but it necessarily also flouts several cardinal rules of statutory interpretation which may properly be applied here.

The first, and perhaps the most important, is the rule which prefers the construction which avoids doubts as to constitutionality. "We cannot," the Court has said, "attribute to Congress an intent to defy the Fifth Amendment or 'even to come so near to doing so as to raise a serious question of constitutional law.'" *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 351-352 (1937). See also Ex parte *Eudo*, 323 U. S. 283, 299 (1944); *United States v. CIO*, 335 U. S. 106, 120 (1948).

Because it is important enough to receive extended treatment, which would unduly interrupt the argument here, we have devoted Point II, *infra*, to the constitutional argument. Nevertheless, we believe we are warranted here in noting, on this point, that the doctrine of *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893)—that the public must pay the full equivalent of the property taken, and that the measurements of just compensation are for judicial and not legislative determination—has been settled constitutional doctrine for over half a century. It was announced by a unanimous court, and has been reaffirmed on numerous occasions. *E.g.*,

Reagan v. Farmers Loan & Trust Co., 154 U. S. 362 (1894); *Seaboard Airline Ry. v. United States*, 261 U. S. 299 (1923); *United States v. New River Collieries Co.*, 262 U. S. 341 (1923); *B. & O. R. R. v. United States*, 298 U. S. 349 (1936); *United States v. Miller*, 317 U. S. 369 (1943).

The words of this Court in *Helvering v. Griffiths*, 318 U. S. 371, 389 (1943), are apposite:

> "We think if Congress had passed or intended to pass an Act challenging a well known constitutional decision of this Court there would appear at least one clear statement of that purpose either from its proponents or its adversaries."

No such statement appears, clear or otherwise. The inference is indeed strong that Congress did *not* intend to challenge the *Monongahela* case, and that Section 902(a) cannot properly be read as requiring the Court to meet that challenge.

The second canon of statutory construction which petitioner ignores is that a statute must be read so as to give it "the most harmonious, comprehensive meaning possible." *Clark v. Uebersee*, 332 U. S. 480, 488 (1947). This guide in construing a statute was explained in *Markham v. Cabell*, 326 U. S. 404 (1945), where it was said:

> "The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve. . . ." (409)
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> ". . . the normal assumption is that when Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole. We should give each as full a play as possible." (411)

In essence the position of the petitioner is that the 1939 amendment to section 902(a) which replaced the indefinite term "fair actual value" with the more precise term "just compensation" for the purpose explained in the reports of the House and Senate Committees, is to be emasculated because the enhancement clause was nevertheless retained. This conclusion would nullify the expressed intent behind the 1939 amendments. Effect can be given to this intent only if the enhancement clause (like the consequential damages clause) is read as an admonition to the administering agency to follow the rules already established by the courts.

The third canon of statutory construction which lends strong support to the respondent's construction of the statute is best stated in *United States v. American Trucking Associations*, 310 U. S. 534, 549 (1940):

> "The Commission and the Wage and Hour Division, as we have said, have both interpreted § 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress."

See also *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1940); *Roland Electrical Co. v. Walling*, 326 U. S. 657, 676 (1946).

Both of the factors which the Court found persuasive in the *Trucking Association* case are present here. The Maritime Commission, the agency charged with the administration of the Merchant Marine Act of 1936, was the motivating force behind the 1939 amendments. And its contemporaneous construction of the section as amended was flatly contrary to petitioner's position, and in full accord with the decision of the court below. The importance of these facts warrants a statement of them in detail.

Chairman Land of the Maritime Commission, writing formally to Chairman Bland of the House Committee on Merchant Marine and Fisheries on March 10, 1939, suggested the proposed amendment and explained its purposes in the following language:

> "The provisions of section 902 as to the determination and payment of just compensation seem to require some clarification and the constitutional rights of private owners whose property may be requisitioned should be protected and defined. For example, section 902(a) provides that 'the owner shall be paid the fair actual value of the vessel at the time of taking or paid the just compensation for the vessel's use based upon such fair actual value.'. The Commission is advised that the Supreme Court has held that the definition and determination of what constitutes just compensation for private property taken and used for public purposes is a judicial and not a legislative question and hence, in harmony with decisions of the Supreme Court, the following language would be more appropriate:
>
> " 'When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property.' " *Hearings before House Com-*

mittee on Merchant Marine and Fisheries on H.R. 4983, 76th Cong., 1st Sess., 5 (1939).

The Maritime Commission and later the War Shipping Administration, as the agency charged with administering section 902(a), followed the construction of the enhancement clause as explained in Chairman Land's letter to Representative Bland from the date of the enactment of the 1939 amendment until the latter part of 1942. This is expressly stated in the notice issued by the WSA to the owners of all vessels purchased, chartered or requisitioned for use or title by the WSA dated December 17, 1942,[11] which reads in part:

> "In view of recent developments with respect to the interpretation of section 902 of the Merchant Marine Act, 1936, as amended, we find it necessary to advise you of the following:
>
> "During the latter part of this year, the Administrator learned for the first time that certain of the officials of the Office of the Comptroller General of the United States were of the opinion that under section 902 of the Merchant Marine Act, 1936, as amended, it was unlawful for the Administrator to pay for vessels requisitioned under section 902 of the act sums in excess of the values of these vessels as of the date of the President's proclamation of limited emergency dated September 8, 1939. Section 902 had been administered by the War Shipping Administrator and prior thereto by the United States Maritime Commission, in a manner that was inconsistent with such interpretation.
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> * * *

[11] This notice is reproduced in full in Appendix A.

"The Administrator promptly transmitted copies of the Comptroller General's opinion to the chairman of the Senate Committee on Commerce and the chairman of the House Merchant Marine and Fisheries Committee. There was at that time pending in the Senate Committee on Commerce legislation affecting the War Shipping Administration known as the omnibus bill and designated H.R. 7424. After considering the Comptroller's ruling, the Senate Committee on Commerce on December 4, 1942, reported out H.R. 7324 with an amendment to section 902 which would *have the effect of eliminating the enhancement clause contained in the existing provision of law, thus confirming the Administrator's application of the law.* The reason for this action was explained in a report submitted on behalf of the committee (No. 1813, 77th Cong., 2d sess.), pertinent excerpts of which are attached herewith."[12]

Thus the Maritime Commission and the WSA from 1939 until November 28, 1942, in administering section 902(a), construed the enhancement clause as adding no new rules to those established by the courts in determining just compensation. A different construction was placed upon this section for the first time late in 1942, not by the agency in charge of administering the measure but by the Comptroller General. When the WSA found itself unable to persuade the Comptroller General as to the correctness of its interpretation of Section 902, the WSA then recom-

[12]Italics added. The adjournment of Congress prevented final action on this bill. Thereafter the several attempts recited above (pp. 10-12) to resolve the intra-government controversy appear to have led Congress to withhold action. Under the circumstances —with an active controversy raging among the administrative agencies, and with no judicial decisions on the point—congressional silence is without significance. *Cf.* Girouard v. United States, 328 U. S. 61, 69 (1946).

mended, as the notice specifically stated, "an amendment to section 902 which would have the effect of eliminating the enhancement clause contained in the existing provision of law, *thus confirming the Administrator's application of the law.*" (Italics added)

It is true, as petitioner's brief points out in the note on pages 33 and 34, that Chairman Land went further in his oral testimony before the committee and did mention the enhancement clause. After restating substantially the language quoted above from his letter, he added:

> "It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts." *Hearings before the House Committee on Merchant Marine and Fisheries on H. R. 4983*, 76th Cong., 1st Sess., 10 (1939).

Petitioner's brief quotes this passage but not the significant paragraphs which precede it. The whole quotation is as follows:

> "Page 3, lines 15 to 25: A rearrangement of the language referring to determination and payment of just compensation is proposed. Some of the wording deleted in lines 16 to 22 has been transferred to subsection (b) on page 4. The phrase 'fair actual value of the vessel' has been omitted in the proposed amendments. The reason for the omission is that the Commission's legal staff has advised that the adjectives 'fair actual' when used in connection with 'value' are indefinite and unnecessary and serve only to suggest that some other kind of value might be used in determining the just compensation guar-

anteed by the Constitution when private property is taken for public use. *Our lawyers say that the determination of just compensation is a judicial function and hence the value of property taken should be determined as a matter of fact, unhampered by any formula.*

"However, the proposed amendments retain the legislative direction concerning the credits that shall be allowed to the United States when the just compensation is determined and paid, such as deductions for construction subsidies and for national defense features. Also, the amendments retain the injunction now carried in section 902 that the value of the property taken and used shall not be deemed enhanced by the causes necessitating the taking and use. It is understood that this provision is a limitation upon the amount of just compensation that may be determined and paid by the Commission, even though there may be some question as to whether such limitation may be binding upon the courts." *Ibid.* (Italics added)

Not only does petitioner separate the statement by Admiral Land from its context, but it also fails to note that the statement was expressly disregarded by the congressional committees. The reports which we have already quoted (pp. 18, 19, *supra*) paraphrase the language of Admiral Land's oral testimony up to the very last sentence—the sentence petitioner quotes—and then *exclude* that sentence. Certainly this is a fair indication that the sentence was not regarded as important. More than that, it no doubt indicates the awareness of the House committee that the enhancement clause was no more than a restatement of the settled judicial concepts applicable to just compensation.

With that awareness, there was no occasion to speculate on the effect of the enhancement clause on the courts; it was an admonition to the administrative body to follow recognized judicial concepts, just like the similar admonition contained in the consequential damage clause.

D. PETITIONER'S CONSTRUCTION OF SECTION 902(a) IS OPEN TO SEVERAL SERIOUS OBJECTIONS.

1. CONGRESS COULD SCARCELY HAVE INTENDED ANY OF THE VAGUE AND ARBITRARY INTERPRETATIONS WHICH PETITIONER BRINGS FORWARD.

Petitioner's brief sets forth two views as to what it suggests that Congress intended. One is the view of the Comptroller General, as it has been evolved since his first opinion in 1942. The other seems to be petitioner's own interpretation of the views of the War Shipping Administration as of 1945. (Petitioner's Brief, pp. 90, *et seq.*). Under the Comptroller General's view, from the award rendered by the Court of Claims as just compensation for the *MacArthur*, petitioner states, "the entire enhancement of $5,000 would clearly be deducted, possibly less some sum" (Petitioner's Brief, p. 125). Under petitioner's interpretation of the War Shipping Administration's eventual view, petitioner states that an "undetermined, but certainly substantial, portion of the $5,000 lump of enhancement should be eliminated" (Petitioner's Brief, pp. 125-126).

Petitioner does not choose between these conflicting interpretations or commit itself as to which better represents petitioner's own view as to the intent of the Congress. Let us examine more closely, however, the divergent views petitioner advocates and their application to the instant case.

The position of the War Shipping Administration as set forth by the petitioner, is not the position which that

agency maintained in its notice to the owners of vessels dated December 17, 1942,[13] nor the position maintained by the Maritime Commission in 1939 when Chairman Land requested Congress to amend Section 902 and his request was adopted by Congress.[14] The interpretation attributed by petitioner to the War Shipping Administration is petitioner's constructions of the rules originally promulgated by the Advisory Board on Just Compensation in December, 1943, and elaborated in October, 1945.

The construction of the enhancement clause thus referred to by petitioner as the War Shipping Administration's position, is based on Rule 4 of the first report of the Advisory Board. This rule was elaborated and clarified two years later by the Board as reconstituted by Executive Orders 9611 and 9627, dated September 10, 1945, and September 24, 1945, respectively. 10 FED. REG. 11637 (1945); 10 FED. REG. 12113 (1945).

The pertinent part of Rule 4 as originally promulgated reads:

> "From the value at the time of taking, there should be deducted any enhancement due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, reasonably probable, whether such need, taking, or prospect, occurred before or after the declaration of the national emergency of May 27, 1941. Enhancement due to a general rise in prices or earnings, whenever occur-

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[13]The notice of December 17, 1942 is quoted in Appendix B.

[14]Admiral Land's letter to Chairman Bland of the House Committee on Merchant Marine and Fisheries, dated March 10, 1939, is quoted in full in Appendix A.

ring, should not be deducted . . ." (Petitioner's Brief, p. 139)

The War Shipping Administration, after attempting to apply this rule to actual cases over a period of slightly less than two years, decided that clarification was necessary and the Board was reconstituted. The Supplement to Rule 4 issued on October 26, 1945, by the Board follows:

> "The provision in Rule 4 that 'Enhancement due to a general rise in prices or earnings, whenever occurring, shall not be deducted' shall be taken to include a general rise in prices and earnings of merchant vessels, not due to the Government's need of vessels which has necessitated the taking, to the previous taking of vessels of similar type, or to a prospective taking, which is reasonably probable." (Supplementary Rule 6; Petitioner's Brief, pp. 148-149)

Under Rule 4, as thus supplemented, enhancement due to a general rise in the prices and earnings of vessels is not to be excluded. The excludable elements are: appreciations due to a prospective taking reasonably probable, appreciations due to the taking of vessels of similar type and appreciations due to the Government's need for vessels which has necessitated the taking.

According to petitioner, in applying this rule to ocean-going vessels, the War Shipping Administration has excluded increases in value of ships—but only those which commenced during and after the first quarter of 1941 when the Lend-Lease Act[15] was under consideration. (Petitioner's Brief, p. 108) While no similar formula has been

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[15]Act of March 11, 1941; 55 STAT. 31.

applied to non-ocean-going vessels, according to petitioner, the record in this case does not show that increases in values of tugs had different causes occurring at different times than increases in values of ocean-going vessels. Hence it would seem that under petitioner's view of the War Shipping Administration's position there should be excluded from the value of the *MacArthur* only increases which occurred during and after the first quarter of 1941 and then only those which are the result of the Government's need of vessels which necessitated *the* taking, the previous taking of vessels of similar type and to a prospective taking reasonably probable.

The Comptroller General's view, as originally announced on November 28, 1942, is that "values in excess of values existing on September 8, 1939" are to be excluded "provided such excess be determined as due to economic conditions directly caused by the national emergency." Relying on an informal inter-office memorandum of November 3, 1948[16] written in the office of the Comptroller General, petitioner states that the Comptroller General would now permit an increase over September, 1939, ship values ranging from 5% for 1940 to 33⅓% for 1944. The Comptroller, it appears, considers this difference to represent enhancement not directly caused by economic conditions resulting from the emergency. (See Petitioner's Brief, pp. 112, 113.) However, such a rule of thumb is not utilized by the Comptroller General with respect to smaller vessels under 1,000 tons, according to petitioner. (See Petitioner's Brief, p. 113.) With respect to such smaller ships, petitioner says the Comptroller General has accepted the War Shipping

[16]Certiorari was granted in this case on October 11, 1948, three weeks before the date of this memorandum.

Administration's determinations on the basis of certification that the "awards did not exceed those payable under the Comptroller's decisions." (Petitioner's Brief, p. 113.) No justification is given for applying this rule of thumb to some vessels and not others. Nor is any explanation given as to the legislative justification for such a dichotomy.

We suggest that the confusion and inconsistency evident in the constructions which the petitioner urges are significant indications that Congress, when it enacted and amended Section 902(a), intended no more than the declaration of settled judicial concepts of just compensation. When one departs from them, one enters a jungle of ideas, opinions and rules of thumb where guideposts are almost wholly lacking. It is inconceivable to respondent that Congress should have intended to require such a result. Yet petitioner's position apparently leads to the conclusion that such was the congressional intent.

2. PETITIONER'S INTERPRETATIONS WOULD PRODUCE UNFAIR AND UNREASONABLE RESULTS.

The most serious defect of petitioner's interpretations is the unreasonable and unfair results they produce when applied to particular cases. Any payment of less than fair value at the time of taking for the tools by which persons earn their living is in effect a capital levy. It is not reasonable or fair that the owners of certain property should be required to make capital contributions while others similarly situated are not. Furthermore, petitioner's interpretations involve the use of pre-determined formulae. No formula can be drawn in advance that will fit equally well the infinite varieties of circumstance of the actual cases.[17] Only a

[17]The Court of Appeals, Second Circuit, recently re-expressed this principle as follows: "Just as one ship differs from another

court, with all the pertinent facts before it, can achieve the constitutional objective of putting the owner in as good a position pecuniarily as though his property had not been taken.

Requisitioning is in its nature arbitrary. Where choice exists in determining which property should be taken, favoritism is always possible. This being so, it is of importance that the person selected to lose his property should be made whole through the application of all the wisdom the judicial process is designed to assure. The process ceases to be judicial if the courts are fettered with pre-conceived legislative or administrative formulae.

Factual examples illustrate how unreasonable and unfair are the results that would follow the application of petitioner's interpretations in the manner petitioner advocates.

Petitioner contends that because the *MacArthur* was requisitioned under Section 902, this Court is obliged to direct an award of one-third less than the amount which respondent could have received on the day of taking by sale in the open market. Petitioner's interpretations require this result, notwithstanding that respondent would be entitled to recover the $15,500 fair value awarded below

(a) if the *MacArthur* had been requisitioned under the General Requisition Act of 1941;[18]

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in kind, condition and availability for use, so there will be variables which prevent the application of any rule of thumb. Each valuation that is contested will have to be reviewed on the merits of the particular case." The Petar (Ozanic v. United States), 165 F. 2d 738, 743 (1948).

[18] 55 STAT. 742. "It should also be noted that many ships have been purchased or chartered directly by the Army or Navy or other Government agencies operating under statutes which do not contain the 'enhancement clause.' Ships have also been pur-

(b) if the *MacArthur* had been sunk through the negligence of a United States destroyer;[19] or

(c) if the *MacArthur* had carried war risk insurance at her market value, and had been taken by the enemy.

Five thousand dollars or a substantial part thereof would be disallowed under the interpretations preferred by petitioner, even though respondent had bought the *MacArthur* the day before her requisitioning under Section 902 and had paid the seller the $15,500 the court found she was worth.[20]

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chased and chartered by the Maritime Commission under Public, 101, Seventy-seventh Congress, which contains no enhancement clause. If the enhancement clause is considered as forcing a return of prices to 1939 levels on requisitions by the War Shipping Administration, then the shipowners dealing with the Army or Navy under other laws would be favored as against shipowners whose vessels are requisitioned by the War Shipping Administration. It would appear doubtful that courts would rule that Congress intended that such a discriminatory result should follow from the enhancement clause." "Practical Aspects of the Application of the Requisition Authority," prepared by the staff of the War Shipping Administration, January 1943. Document 20, pp. 191, 206.

[19]The Petar, 68 F. Supp. 296 (S. D. N. Y. 1946), *aff'd sub nom.* Ozanic v. United States, 165 F. 2d 738 (C. C. A. 2d 1948); Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U. S. 146 (1925).

[20]The Comptroller General reached this result in a ruling dated May 17, 1943. He recognized that such a result created hardship but held that his interpretation of Section 902 left no choice. (Document 20, p. 186) Had the purchase been from the United States, even the Comptroller General could not, we believe, countenance the payment of less than the United States had received, assuming the market remained constant.

The Comptroller General's modified interpretation, as set forth by petitioner, continues the incongruities illustrated above and compounds a new one. This modified interpretation allows

"Most of the small vessels were requisitioned for title, whereas most of the larger vessels constituting the ocean-going fleet were requisitioned only for use." (Document 20A, p. 1) Most of the foreign-owned vessels also were taken for title though some were purchased at market value. (*ibid.*)

Section 902(a) requires that a vessel taken for use must "be restored to the owner in a condition at least as good as when taken, less ordinary wear and tear, or the owner shall be paid an amount for reconditioning sufficient to place the property in such condition." Yet the interpretations preferred by petitioner would compensate those who lost their ships and had to replace them with less than the cost of substituting a like ship.[21] In deciding whether a ship should be taken for title or for use the War Shipping Administration, under petitioner's view, was entitled to bind the courts as to which owners should contribute a disproportionate share for the common good.

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an increase over 1939 values for vessels taken in 1941 of 14.1%, 1942 of 22.9% and 1943 of 29.9%. These were based on an index of ship building costs (Petitioner's Brief, p. 112, note; Appendix F), but petitioner concedes that the market for old vessels did not follow this index. Prices of old ships were higher in 1941 than in 1942, or later. (Petitioner's Brief, pp. 106, 107 and notes). It would compensate less for an old vessel taken in 1941 when prices were high than in 1943 when petitioner says they were low. The disparity in result is even more marked when one takes into account that the owner of the vessel taken in 1943 would have enjoyed an additional two years' use of his ship.

[21]The Act of which Section 902 is a part had as one of its purposes the fostering of a healthy "merchant marine . . . owned and operated under the United States flag by citizens of the United States. . . ." MERCHANT MARINE ACT OF 1936 § 101, 49 STAT. 1985, 46 U. S. C. § 1101 (1936). It is unreasonable to assume, as petitioner's interpretations and argument do, that the Congress that sought to encourage ship ownership intended to prevent a measure of compensation for ships below that recognized for all other kinds of property.

To contend that Section 902(a) requires the courts to reach results so unreasonable as the foregoing is to ascribe to the Congress an intent to be unfairly discriminatory and capricious.

We submit, therefore, that on its text and context, on its legislative history, on well-settled rules of statutory construction, and on the practical deficiencies of petitioner's constructions, Section 902(a) was properly construed by the court below, and that the judgment should be affirmed on that ground.

II

PETITIONER'S CONSTRUCTION OF SECTION 902(a) RAISES SERIOUS DOUBTS AS TO ITS VALIDITY UNDER THE FIFTH AMENDMENT.

We have adverted, in Point I, to the fact that one compelling objection to petitioner's interpretations of Section 902(a) is that they raise a serious constitutional question, which respondent's construction avoids entirely. We believe the constitutional issues warrant separate and extended treatment. Indeed, though it is not necessary so to hold in this case, we believe the following discussion will demonstrate that the petitioner's interpretations are quite plainly unconstitutional under the Fifth Amendment.

Respondent recognizes that Congress has authority to stabilize prices, to restrict profits, and to institute similar essential financial and economic controls during emergency wartime periods: *United States v. Bethlehem Steel Corp.*, 315 U. S. 289 (1942); *Lichter v. United States*, 334 U. S. 742 (1948); *Bowles v. Willingham*, 321 U. S. 503 (1944).

Respondent does maintain, however, that when private property is taken, whether in the exercise of the war power

or any other power, just compensation must be paid as guaranteed by the Fifth Amendment. The just compensation clause "prevents the public from loading upon one individual more than his just share of the burdens of government. . . ." *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893); see also *Louisville Joint Stock Bank v. Radford*, 295 U. S. 555 (1935); *United States v. Miller*, 317 U. S. 369 (1943); *Olson v. United States*, 292 U. S. 246 (1934).

And the guarantees of the Fifth Amendment are not eliminated by the war power or any other power. Ex parte *Endo*, 323 U. S. 283 (1944).

Let us take a simple illustration of the petitioner's contention. Sister ships are owned by two separate persons. At a given date one of the owners sells his vessel on the open market and on the same date the other vessel is requisitioned by the Government. The first owner would receive the market value of his vessel; the second owner would receive appreciably less than market value, assuming values to have increased appreciably from the date when they were fixed for requisitioning purposes.

In view of the recent pronouncements of this Court, no one can doubt the gravity of the constitutional issue which that illustration presents. In *Bowles v. Willingham*, 321 U. S. 503, 517 (1944), the Court in sustaining the constitutionality of the Emergency Price Control Act of 1942 was careful to observe:

> "We are not dealing here with a situation which involves a 'taking' of property. *Wilson* v. *Brown*, *supra*. By § 4(d) of the Act, it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accom-

modations for rent.' There is no requirement that the apartments in question be used for purposes which bring them under the Act."

Similarly, in *United States v. John J. Felin & Co.*, 334 U. S. 624 (1948), Mr. Justice Frankfurter, joined by the Chief Justice and Mr. Justice Burton, said:

> "The conventional criterion for determining what is 'just compensation' for private property taken for public use is what it would bring in the free, open market. . . . In enforcing this constitutional requirement 'the question is what has the owner lost, not what has the taker gained.' *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *McGovern* v. *New York*, 229 U. S. 363. Respondent's sole claim is for the pecuniary equivalent of the property taken" (629-630).

Mr. Justice Reed, with whom Mr. Justice Black and Mr. Justice Murphy joined, said:

> "It is the market value of any product that is the basis for just compensation (643).
>
> * * * * * *
>
> "It has long been established that in a free market the market price is the proper criterion for determining 'just compensation'" (644).

Mr. Justice Jackson, with whom Mr. Justice Douglas joined, said:

> "The Fifth Amendment's 'exact limitation on the power of the government' is not market price—it is just compensation. The former is relevant, and this Court has so considered it, only because, in a free market, it is perhaps the best key to value at the time of taking" (652).

Likewise, in *United States v. Petty Motor Co.*, 327 U. S. 372 (1946), which involved the condemnation of a leasehold interest under the Second War Powers Act, 56 STAT. 176, 177, Mr. Justice Reed, speaking for the majority, stated:

> "The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.' It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings (377-378).

And in a concurring opinion Mr. Justice Rutledge observed that the rule of compensation would be different when a short or long term use of property is taken than would be the case when the owner's entire interest is taken, adding:

> "The purpose and the basis for this were to give substance, in practical effect, to the Amendment's explicit mandate for payment of '*just* compensation' in cases of such extraordinary 'takings' and to prevent those words from being whittled down by legalistic construction into means for practical confiscation" (383).

Certainly it is not to be presumed that the principle that just compensation means the value of the property "ascer-

tained as of the date of the taking,"[22] so carefully adhered to by a long line of cases,[23] would be discarded cavalierly. Hence, serious doubts would clearly exist as to the constitutionality of such an imagined statute pegging values for requisition purposes.

Moreover, nothing in *United States* ex rel. *TVA v. Powelson*, 319 U. S. 266 (1943), eliminates these doubts. Not one penny was deducted in that case from market value. The property owner there asserted that its land was worth more than the market price, contending that the owner's power of eminent domain, conferred by the state of North Carolina, would enable it to combine the land which it owned with numerous pieces of land to form a large power development. The Court pointed out that if the land in question had been condemned by North Carolina, the owner's privilege of eminent domain, which had been granted by the state, would not have been an element of value, saying:

> "The inclusion of eminent domain would be but an indirect method of making North Carolina pay for the destruction or impairment of the privilege" (277).

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[22]United States v. Miller, 317 U. S. 369, 374, (1943). In this opinion, the just compensation guarantee of the Fifth Amendment was also explained in the following manner:

> "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken" (373).

[23]Boom Co. v. Patterson, 98 U. S. 403 (1879); Monongahela Navigation Co. v. United States, 148 U. S. 312 (1893); Bauman v. Ross, 167 U. S. 548 (1897); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 (1913); Seaboard Air-Line Ry. v. United States, 261 U. S. 299 (1923); United States v. New River Collieries Co., 262 U. S. 341 (1923); Olson v. United States, 292 U. S. 246 (1934); United States v. Miller, 317 U. S. 369 (1943).

And later the Court added:

> "No precedent has been advanced which suggests that a *different* measure of compensation should be required where the United States rather than the state is the taker of the property for a public project. Nor has any reason been suggested why as a matter of principle or policy there should be a *different* measure of compensation in such a case" (278).

Nor are these doubts dissipated by adverting to decisions of this Court reviewing state condemnation proceedings. (Petitioner's Brief, p. 55, note 37, and p. 56.) Petitioner's view of these cases is that the right to just compensation under the Fifth Amendment is satisfied unless a statute prevents the property owner "from obtaining substantially any compensation," quoting from *Chicago, B. & Q. R.R. v. Chicago*, 166 U. S. 226, 247 (1897).

The cases relied on by petitioner to support this suggestion, however, do not do so. All of these cases involve appeals to this Court from state court condemnation proceedings. In *every* case the applicable state statute or constitutional provision provided for the payment of "just compensation" or its equivalent. The complaint of the appellant in each case was based on some alleged defect in the court proceedings which had deprived him of due process of law.

In *Chicago, B. & Q. R.R. v. Chicago, supra*, for example, the Court used the words quoted in part by petitioner. Discussing the extent of the review permitted to this Court, Mr. Justice Harlan said (at 246):

> "We are permitted only to inquire whether the trial court prescribed any *rule of law* for the guid-

ance of the jury that was in absolute disregard of the company's right to just compensation.

"We say, 'in absolute disregard of the company's right to just compensation,' because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here . . . Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted." (Italics added.)

If this Court had undertaken to review the award in the *Chicago* case in the manner advocated by the appellant it would have to review every state condemnation case in which a property owner was awarded less than he thought he should receive. The essence of the Chicago decision is entirely sound and it is this: Granted a statutory or state constitutional framework which provides just compensation to property owners who suffer requisition by the state, the Court will not—and cannot—inquire into every detail of a judicial proceeding carried through by an established court acting within the legislative or constitutional framework. As Mr. Justice Holmes said in *McGovern v. New York*, 229 U. S. 363, 370 (1913), this Court cannot interfere in the way a state court applies its own statutes unless there appears "something more than an ordinary honest mistake of law."[24]

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[24]Mr. Justice Cardozo, speaking for the Court in Roberts v. New York City, 295 U. S. 264, 277 (1935), said: "The Fourteenth Amendment is not a guaranty that a trial shall be devoid of error."

Nor are the constitutional doubts of an imagined congressional enactment pegging value for requisition purposes dissipated by reference to decisions of courts in foreign countries (Petitioner's Brief, pp. 47-48, 61-64, 71, *et seq.*). In most of these countries there is no constitutional guaranty similar to that provided in the Fifth Amendment to the United States Constitution. Thus, the British, French, Canadian and New Zealand material is not relevant.[25]

Petitioner's use of certain Australian cases that purportedly buttress its position merits comment in order to avoid any misunderstanding as to the principles enunciated therein.

At pages 47-48 of its brief petitioner cites *Minister of State for the Army v. Dalziel*, 68 C.L.R. 261 (1944), as having "established" the "law of Australia" which permits Parliament to fix reasonable "acquisition terms" that are binding on the courts. The implication is that the High

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[25]The plain language of the British compensation statute contradicts petitioner's statement of its meaning. It is true that monthly payments of compensation in the form of charter hire, under paragraph (a) of Section 4(1) of the British statute, are to be fixed without regard to any appreciation in the value of such charters due to the emergency; but petitioner neglects to inform this Court that the proviso in regard to appreciated values does *not* apply to paragraph (d) of the same subsection. This paragraph gives the owner of requisitioned property that has become a total loss its "value" *at the time of loss* with no deduction or exclusion for "appreciation" or "enhancement" due to the emergency, the war, or any other cause. The owner of a ship requisitioned by the British Government and then lost would receive (1) charter hire for the period during which the Government sailed the vessel before the loss; *and* (2) the full value of the vessel at the time of the loss; *and* (3) under paragraph (e), expenses reasonably incurred in complying with Government directives concerning the requisition—what is clearly a "consequential" damage under American law. Contrast these advantages of the British shipowner with the position of the American shipowner should petitioner's contention be adopted by this Court.

Court of Australia would uphold petitioner's construction of the enhancement clause as "just."

Such an implication is unjustified. The High Court in the *Dalziel* case actually *invalidated as unjust* a regulation and subsidiary order which prescribed the measure of compensation for a taking. Petitioner neglects to mention this vital fact, however, until it comes to footnote 53 at pages 72 and 73 of its brief. Petitioner's text at pages 62 and 63 quotes two passages from one of the *dissenting* opinions in the *Dalziel* case without mentioning that fact.[26]

The order which was invalidated in the *Dalziel* case was one providing that in awarding compensation for wartime requisitions no account should be taken of lost profits. In striking down this provision Justice Rich said (at 287):

> "It is by the Constitution itself that the acquisition is required to be on just terms; and, since Parliament is bound by the Constitution, by no artifice or device can it withdraw from the determination by a court of justice the question whether any terms which it has provided are just, that is, terms which secure adequate compensation to those who have been expropriated."

There is no difference in principle between this restriction invalidated in the *Dalziel* case as "unjust" and the enhancement clause as it is construed by petitioner in this case.[27]

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[26]Footnote 42 on page 62 of Petitioner's Brief also quotes a passage from the dissenting opinion of Starke, J.

[27]The so-called "enhancement clause" which was contained in the Australian compensation order was not in issue in the *Dalziel* case, but was invalidated in *Minister of State for the Army v. Pacific Hotel Proprietary Ltd.*, unreported but noted in 68 C. L. R. 310. It is impossible to tell from the note on what basis the court relied in invalidating the clause.

The *Grace Brothers* case,[28] also relied on by petitioner, is simply a variant of *United States v. Miller, supra,* as Justice Starke, (at page 286) pointed out, at the same time remarking that any statute which attempted to set a valuation date which was not "about" the time of the taking would not be "just" and would, therefore, be unconstitutional.[29]

If petitioner had sought to discover the Australian law as it related to just compensation for requisitioned ships, it should have studied the case of *Minister of State for the Navy v. Rae,* 70 C.L.R. 339 (1945). This case, decided by Justice Dixon, involved review by the High Court of compensation awarded for the requisition of a vessel taken by the Government in November 1943. The High Court said (at 344):

> "If there is a market for a ship that is the most satisfactory test of its value . . ."

The court found, however, that there was no market for vessels of the kind in question at the time of the taking. It therefore expressed the following method of arriving at a proper compensatory value:

> ". . . I think it is wise to use such scanty evidence as is contained in the transcript to attempt to con-

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[28]Grace Brothers Proprietary Ltd. v. Commonwealth, 72 C. L. R. 269 (1946).

[29]In the same case Justice Dixon said:

> "In conditions of great economic instability, when the measurement of values in money fluctuated violently and rapidly, it perhaps might be that just terms would require not only valuation, but payment almost as at the date of acquisition. Further, a statute which fixed some anterior date for the ascertainment of value because values were known generally to be lower might be open to attack. Here, however, we are not confronted with any such question." (291-292)

> struct a pre-war value, and then add to that what is thought to be an appropriate percentage to *represent the increase in the cost of production and generally in the value of craft*" (347). (Italics added)

Consequently, the final decision of the court awarded compensation which included an *addition* of more than 10% of the vessel's pre-war value in order to allow for "the appreciation of values by reason of increased costs and other elements attributable to the war" (348).[30]

Moreover, one cannot ignore another consequence of petitioner's argument, with particular reference to foreign countries. If we should fail to compensate our citizens and foreigners with the full value of their property when taken for public use, we would undermine our ability to protect American owned property abroad from expropriation with inadequate compensation.[31] The War Shipping Administration had these considerations in mind when it wrote:

> "We doubt that Congress intended . . . to furnish to foreign nations a precedent under which they could, at some future time, requisition American-owned property, not upon a basis of fair value at the date of requisitioning . . ." (Document 20, pp. 205-206)

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[30] *Cf.* Chief Justice Latham in Commonwealth v. Huon Transport Proprietary Ltd., 70 C.L.R. 293, 300. (1945): "If there were a market in which vessels of this kind could be hired in Tasmania, the market rates would be the best evidence of what it would be fair for the Commonwealth to pay" [for ships requisitioned during the war].

[31] Secretary of State Hull on April 16, 1943 wrote the War Shipping Administrator:

> "While the matter is of importance from the standpoint of the international responsibility of this Govern-

Returning to our own constitutional precedents, it will not have been overlooked that any taking of capital goods at less than their value is tantamount to a capital levy. If the exigencies of war or other national crisis in this country should ever reach such a point as to warrant a capital levy, due process will require that this be distributed fairly and not be left—as under petitioner's contentions—to arbitrary selection.

We submit, therefore, that nothing appears in the decisions of this or any other court to weaken respondent's contention that an attempt by the Congress to peg values at a specified date for purposes of determining just compensation would even in wartime give rise to serious constitutional doubts.

III

On the facts found in this case, the judgment below should be affirmed on any construction of section 902(a)

There is no doubt that, if respondent's interpretation of Section 902(a) is correct, the decision below should be affirmed. The court's findings are clear that the award of $15,500 represented the fair market value of the *MacArthur*, that it constitutes just compensation to the respondent, and that it includes no elements of enhancement which courts exclude in just compensation cases. The award does not include any elements of the special adapta-

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ment with respect to the properties of nationals of foreign countries; it is also of importance from the point of view of the expropriation by foreign governments of extensive properties of American nationals in foreign countries, whose interests we must keep in mind." (Appendix C).

bility of the *MacArthur* to respondent's use, or of the peculiar fitness of the *MacArthur* to the petitioner's purposes (R. 12-14), nor was any part of the enhancement of value due to the prospect that she would be requisitioned (R. 13). We need not argue the point, for we do not understand that the petitioner challenges this conclusion.

The petitioner assumes, however, that if one of its readings of Section 902(a) should be adopted, the decision below should be reversed. Unless that is correct, however, it is plainly settled that the Court will not undertake to pass on any issue, much less a delicate question of constitutional law, that is presented to it in the abstract. *Liverpool, N. Y. & P. Steamship Co. v. Commissioners of Emigration*, 113 U. S. 33, 39 (1885); *Ashwander v. TVA*, 297 U. S. 288, 324 (1936); *Cincinnati v. Vester*, 281 U. S. 439, 448-449 (1930). We submit that petitioner is in error on the facts; that even under its construction of Section 902(a), the decision below must be affirmed.

The record here shows that the Government uninterruptedly owned and retained possession of the *MacArthur*, originally named the *Guthrie*, from the date of her launching in 1895 until her sale to respondent in March 1942 (R. 5, 6). The record further establishes the facts that the March 1942 sale to the respondent was an open market transaction with competitive bids solicited and that the ship was sold to the respondent as the highest of three bidders (R. 8).

The court below found that prior to the proclamation of May 27, 1941, the general rise in the market value of vessels was due to the demand for vessels which followed the outbreak of the war in Europe (R. 12). After that date the rise in market values was due in part to the Government's

need for vessels and in part to the great increase in shipping and harbor traffic which occurred during the period of the war (R. 12-13). As a result, the value of the *MacArthur* had been enhanced by the sum of $5,000 by October 15, 1942, the date of taking (R. 13).

Under petitioner's "preferred" reading of Section 902 (a)—the Comptroller General's view—the entire enhancement of $5,000 would be excluded. This is so unfair as to be absurd. The vessel was owned by petitioner during the entire period from its building to March 19, 1942, and increases in value up to that period were necessarily reflected in the sale price to respondent. Certainly Section 902(a) cannot mean that petitioner can sell at the enhanced value of March 1942 and six months later requisition the same vessel at the 1939 value.

Nor does petitioner fare better on its second-best reading of Section 902(a). The court below found that the fair market value of the vessel at the time of taking was $15,500 (R. 13). Petitioner admits that the vessel could have been sold on the market for this amount (Brief, p. 9, note). Certainly, presumptively at least, the market value having been established, the burden was on petitioner to show that this value was enhanced "by the causes necessitating the taking." The findings, which are not contested, show that petitioner did not, and cannot now, sustain that burden.

Even under the broadest reading of the ruling of the Advisory Board the "causes necessitating the taking" cannot be "the demand for vessels which followed the outbreak of the war in Europe," or "the great increase in shipping and harbor traffic which occurred during the period of the war." Nor can any more be said of the finding that the rise in market value of vessels was due in part "to the Govern-

ment's need for vessels, which necessitated the taking of many vessels." The court below also found that it was not possible to allocate to this cause a definite part of the increase in market value.

Petitioner attempts to avoid the dilemma which confronts it in this case by the remarkable statement (Brief p. 127) that—

> "the findings themselves indicate the likelihood that the larger part of the $5,000 enhancement from September 1939 to October 1942 accrued in the seven month period respondent held the vessel (March 19, 1942-October 15, 1942)."

This assertion does not make sense. The record is barren of any evidence that the value of the *MacArthur* was enhanced during the seven months she was owned by respondent due to any of the causes which petitioner contends are to be excluded. In fact, at another point in its brief, petitioner appears to concede this point. In discussing values for ocean-going vessels, petitioner states (p. 106):

> "Toward the end of 1941, these prices and rates began to fall and by the time the full scale requisitioning program commenced in April 1942, the market values of ocean-going vessels were lower than they had been in May 1941, but still substantially higher than the 1939 levels."

With values, as petitioner contends, on the decline from late 1941 to April 1942, it is only reasonable to assume that the decline continued, or at the least that values did not increase. Certainly nothing occurred during these seven months (either of common knowledge or contained in the record of this case) which would indicate that the decline in value was offset by a rise in values.

The *MacArthur* was a tug, not an ocean-going vessel; but to infer, as petitioner's assertion does, that the market for tugs stayed down while for other vessels it went up, then up for tugs when others came down is to challenge credulity and, more, makes a travesty of petitioner's deductions regarding the causes of the enhancement.

The actual basis for the increase in value of the *MacArthur* between March and October 1942 is, however, disclosed in the record. The purchase price paid by the respondent in March 1942 was $2,875 (R. 8). And in reconditioning the *MacArthur* respondent expended a total of $5,699.78 on labor and materials (R. 9). But it was also found that this "amount would have been substantially greater had all of the work been performed by a shipyard at the abnormally high rates being charged at that time" (R. 9). Thus the total monetary expenditure of respondent amounted to $8,574.78.

The value of the ship in October, 1942 when requisitioned in New York was $15,500 as determined by the Court of Claims. The difference between this amount and the total funds expended by respondent in the purchase and reconditioning of the *MacArthur* was certainly not due to the elements of enhancement that might be excluded by either the Comptroller General or by petitioner's construction of the War Shipping Administration position. For the court below found that the sums expended by respondent "would have been substantially greater had all the work been performed by a shipyard at the abnormally high rates being charged at that time." Moreover, as a result of the extensive repairs, new equipment, and supplies, this vessel was put in first class condition and certificated on April 20, 1942 as a "towing steam vessel" (R. 8). At no other time during

the long life of the *MacArthur*, from her launching in 1895 to April 1942, had the vessel been designated as a towing steam vessel. The record specifies that the *MacArthur* "was never used for towing other vessels except in emergencies or for rescue work" (R. 6), and the use to which, prior to April 1942, she had been put "was much lighter than that engaged in by commercial towing vessels and consisted of irregular and infrequent trips from her berth in the harbor to and from incoming vessels." (R. 6) Hence, the total funds actually expended by the respondent by no means represented the actual increase in value of the *MacArthur* which were attributable to this work. Furthermore, the sale took place in Portland, Maine, and the requisition in New York harbor (R. 8, 9, 10).

Finally, if the Government failed to attain the best price possible in selling the *MacArthur* in March, 1942 as a result of ineffective advertisement or for any other reason, the enhancement clause does not permit the Government to correct its mistakes by paying less than fair value when it requisitions the vessel.

According to petitioner's own admission, the Comptroller General maintains that it "is only fair and just that the Government should pay . . . an increment representing the actual increases and the labor and material costs involved in building ships . . . since it [the increment] may be regarded as constituting, in effect, actual out-of-pocket loss by the owner due to the taking of his property" (Petitioner's Brief, pp. 112, 113). Certainly, the increased price which respondent had to pay for repairs in reconditioning the *MacArthur* likewise constitutes "in effect, actual out-of-pocket loss by the owner."

By petitioner's own admission, its less preferred interpretation would result in no less liberal an award than would the interpretation of the Comptroller General.[32]

We submit, therefore, that neither the Comptroller General's interpretation nor petitioner's view of the War Shipping Administration's interpretation, as applied to the *MacArthur*, would result in the reduction of the award of $15,500 rendered by the Court of Claims. Even if the petitioner were to evolve some theory by which, if one of its readings of Section 902(a) were to be adopted, it could prevail on this record, the fact remains that the precise application of the several interpretations of Section 902 cannot adequately be tested in this case. It is settled that the Court will not undertake to deal with a specific constitutional issue the contours of which cannot be fixed by specific application to facts which squarely raise the issue. *Tennessee Publishing Co. v. American National Bank*, 299 U. S. 18, 22 (1936); *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 210 (1934); *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 251 (1928).

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[32]See Petitioner's Brief, pp. 125-126, where it is stated:

"On the Comptroller General's view, the entire enhancement of $5,000 would clearly be deducted, possibly less some sum for enhancement not directly caused by economic conditions resulting from the emergency. . . .

"Under the Advisory Board's Rule, an undetermined, but certainly substantial, portion of the $5,000 lump of enhancement should be eliminated."

CONCLUSION

Wherefore, it is respectfully submitted that the judgment below is correct and should be affirmed.

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January 1949.

APPENDIX A

*Letter From Chairman Land Of Maritime Commission to Chairman Bland of House Committee on Merchant Marine and Fisheries.**

UNITED STATES MARITIME COMMISSION,
Washington, March 10, 1939.

Hon. S. O. BLAND,
Chairman, Committee on Merchant Marine
and Fisheries, House of Representatives,
Washington, D. C.

MY DEAR MR. CHAIRMAN: As stated in my letter to you dated February 27, 1939, setting forth the Commission's views and recommendations on H. R. 131, a bill to amend sections 712 and 902 (a) of the Merchant Marine Act, 1936, as amended, relative to the requisitioning of vessels, the Commission has been making a study of the procedure and substantive problems which may arise if it is found necessary to exercise the emergency powers vested in the Commission by the provisions of section 902 of the Merchant Marine Act, 1936, as amended.

As a result of discussions between representatives of the Commission and of the Navy Department concerning the formulation of plans for the speedy and effective use of privately owned merchant vessels and other watercraft during a period of emergency proclaimed by the President, the Commission is persuaded that the authority vested in the Commission under section 902 should be enlarged and expanded, and the rights of private owners should be clarified and protected, as follows:

The authority to acquire vessels in an emergency is now limited to requisitioning those "documents under the laws of the United States." It may be desirable to acquire vessels

*Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4983, 76th Cong., 1st Sess., 5 (1939).

owned by citizens of the United States and operated under foreign registry or to acquire small watercraft which are not registered, licensed, or enrolled under the laws of the United States, or to acquire vessels which are under construction in American yards.

In some cases, perhaps, the interests of the Government would be best served if the necessary vessels and other watercraft were acquired by purchase or the use thereof were obtained through charters rather than through requisition.

Because of the foregoing considerations, it is suggested that section 902 be amended so that it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft constructed or under construction, or, for any period during the emergency, to requisition or charter the use of any such property.

Cases may arise where it will be preferable to requisition merely the use of a vessel and permit the owner to operate under a requisition charter for the account of the United States. Such authority as to vessels was granted to the President in section 11 of the act of July 18, 1918 (40 Stat. L. 913), which also provided in effect that the terms of the charter proposed to the owner should constitute a determination of just compensation. If the owner was unwilling to accept the charter, he could take 75 percent of the charter hire tendered and sue for such further sum as would amount to just compensation for the use of the vessel. It is suggested that provision be also made for compensation to the owner for the loss or damage to a vessel when its use had been requisitioned, but no agreement had been reached as to its value or as to compensation for its loss or damage. It is recommended that section 902 be expanded by inclusion of similar provisions with respect to the requisition by the Commission of the use of vessels and other watercraft.

As section 902 now stands, there is no provision for a declaration that the period of the emergency has ended. Consequently the Commission might continue to exercise

emergency powers for a long time after the necessity therefor had terminated. To correct this apparent oversight it is recommended that the following provision be added:

"The termination of any emergency so declared shall be announced by a further proclamation by the President."

The provisions of section 902 as to the determination and payment of just compensation seem to require some clarification and the constitutional rights of private owners whose property may be requisitioned should be protected and defined. For example, section 902 (a) provides that "the owner shall be paid the fair actual value of the vessel at the time of taking or paid the just compensation for the vessel's use based upon such fair actual value." The Commission is advised that the Supreme Court has held that the definition and determination of what constitutes just compensation for private property taken and used for public purposes is a judicial and not a legislative question and hence, in harmony with decisions of the Supreme Court, the following language would be more appropriate:

"When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property."

Section 902 now contains no provision for a partial payment on account of just compensation to an owner who is unwilling to accept the amount awarded by the Commission and elects to sue the United States. The Emergency Shipping fund provisions of the act of June 15, 1917 (40 Stat. L. 182), which authorized the President to requisition vessels, provided that when the amount of just compensation awarded by the President, "is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor."

It is suggested that in instances it may work an undue hardship to take private property for public purposes and

to require the owner to wait for all of his compensation therefor until his rights are determined by the courts, in any case where he is unwilling to accept the award made by the Commission. Accordingly, it is recommended that a provision similar to the one contained in the earlier emergency legislation (but now repealed) be incorporated in section 902.

It is further recommended that authority be given to the Commission to repair, recondition, reconstruct, and operate, and to charter for operation, any property acquired under authority of section 902. Also, to carry out plans being worked out with the Navy Department, authority should be granted to the Commission to transfer possession and control of any property acquired under authority of section 902, to any department or agency of the Government, under such terms and conditions as may be approved by the President, and to provide for prompt reimbursement by such department or agency for any expenditures made by the Commission on account of the vessels or watercraft so transferred.

If the suggestions and recommendations herein set forth meet with favorable consideration, their inclusion in section 902 may require a complete redrafting and rearrangement of the language now employed in that section.

The foregoing suggestions and recommendations should be considered in connection with the provisions of H. R. 131 now before your committee and as an amplification of the views and recommendations on that bill previously submitted in my letter to you dated February 27, 1939. A draft of a bill which would carry out these suggestions is enclosed.

This report, together with copy of the letter dated March 9, 1939, from the Acting Secretary of the Navy concurring in the proposed report and draft of amendment attached thereto, has been submitted to the Acting Director, Bureau of the Budget, and the Commission is advised by him that there would be no objection to the submission of the report to your committee.

Very sincerely yours,

(Signed) E. S. LAND, *Chairman.*

APPENDIX B

*Notice From War Shipping Administration to Owners of Requisitioned Vessels Suspending Payments of Previously Determined Values and Setting Up Alternative Method of Payment on Basis of November 28 Ruling to Alleviate Hardships.**

WAR SHIPPING ADMINISTRATION,
Washington, December 17, 1942.

To the Owners of All Vessels Purchased, Chartered, or Requisitioned for Use or Title by the War Shipping Administration:

In view of recent developments with respect to the interpretation of section 902 of the Merchant Marine Act, 1936, as amended, we find it necessary to advise you of the following:

During the latter part of this year, the Administrator learned for the first time that certain of the officials of the Office of the Comptroller General of the United States were of the opinion that under section 902 of the Merchant Marine Act, 1936, as amended, it was unlawful for the Administrator to pay for vessels requisitioned under section 902 of the act sums in excess of the values of these vessels as of the date of the President's proclamation of limited emergency dated September 8, 1939. Section 902 had been administered by the War Shipping Administrator and prior thereto by the United States Maritime Commission, in a manner that was inconsistent with such interpretation.

As soon as the views of the subordinate officials of the Comptroller General were made known to the Administrator, conferences were held with the Comptroller General, but no solution to the problem developed therefrom. The

*Document 20, pp. 129-133.

Comptroller General then offered to state his views upon receipt of a formal request for an opinion which could be transmitted to Congress for such action as it deemed appropriate. Accordingly, the Administrator directed a request to the Comptroller General of the United States for formal opinion under date of November 24, 1942, on 15 specific questions, and on November 28, the Comptroller General replied on all points. A copy of his opinion is attached herewith.[1]

You will note that, in the opinion of the Comptroller General, values of all vessels, including both large and small craft—freighters, passenger ships, tugs, barges, fishing vessels, and other watercraft—were, in effect, frozen by the President's proclamation of limited emergency on September 8, 1939, except for vessels built or rebuilt after that date, as to which the Comptroller apparently would allow payment of actual cost less depreciation, and that, in his opinion, the Administrator may not lawfully pay for use or title to vessels at higher rates or values than those prevailing on September 8, 1939. It will be noted that the 1939 values apply notwithstanding the fact that the vessels were purchased after that date at substantially higher cost and even though replacement vessels cannot now be obtained at 1939 prices. Charter rates also would be reduced under this ruling to September 8, 1939, levels, except for additional allowances for increases in expenses since that time.

Immediately upon receipt of this opinion, the Administrator ordered that payments for vessels purchased or requisitioned for the War Shipping Administration under section 902 of the Merchant Marine Act, 1936, as amended, be discontinued. Payments for vessels lost from marine or war casualties under charters made under this section were also stopped pending a clarification of the situation.

The Administrator promptly transmitted copies of the Comptroller General's opinion to the chairman of the Senate

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[1] Attachment omitted.

Committee on Commerce and the chairman of the House Merchant Marine and Fisheries Committee. There was at that time pending in the Senate Committee on Commerce legislation affecting the War Shipping Administration known as the omnibus bill and designated H. R. 7424. After considering the Comptroller's ruling, the Senate Committee on Commerce on December 4, 1942, reported out H. R. 7324 with *an amendment to section 902 which would have the effect of eliminating the enhancement clause contained in the existing provision of law, thus confirming the Administrator's application of the law* [italics added]. The reason for this action was explained in a report submitted on behalf of the committee (No. 1813, 77th Cong., 2d Sess.), pertinent excerpts of which are attached herewith.[1]

However, although the bill was placed on the Senate Calendar, it did not come to a vote prior to adjournment of this Congress, leaving the entire question open for the next Congress—see Congressional Record of December 15, 1942.

During the interim, unless the Administrator applies the statute in accordance with the Comptroller General's ruling, he will be in a position of administering the law in a manner inconsistent with the interpretation of the Government's accounting officers. Under the circumstances, the Administrator feels that it is incumbent upon him, in view of the large sums of money involved in this problem and the public interest relating thereto, to apply the Comptroller General's ruling and accordingly to take the following action:

* * *

It is hoped that the action of the Administrator as above outlined will not cause undue hardship or inconvenience to the owners and operators of vessels. The Administrator is most anxious that the problem of valuation should not impede the prosecution of the war and, accordingly, wishes to make certain that adequate funds for

[1] Attachment omitted.

operating requirements will be available to owners whose vessels are being operated in the war effort. It is believed that the above arrangements will accomplish this objective without violating the rules laid down by the Comptroller General. Suggestions for further relief will be given prompt consideration. The Administrator will be prepared to confer with owner's representatives during the week of December 21 for this purpose.

W. C. PEET, JR.,
Secretary, War Shipping Administration.

DECEMBER 31, 1942

APPENDIX C

*Letter From Secretary of State to War Shipping Administration, Together With Accompanying Memorandum.**

DEPARTMENT OF STATE,
Washington, April 16, 1943.

Rear Admiral EMORY S. LAND,
Administrator, War Shipping Administration.

MY DEAR ADMIRAL LAND: With reference to previous correspondence and conferences between officers of the War Shipping Administration and this Department in relation to the matter of compensating Danish nationals for vessels requisitioned by this Government pursuant to the provisions of Public Law 101, Seventy-seventh Congress, approved June 6, 1941 (55 Stat. 242), I enclose a memorandum setting forth important considerations which it is believed should be taken into account in connection with the settlement of the claims of the Danish owners.

While the matter is of importance from the standpoint of the international responsibility of this Government with respect to the properties of nationals of foreign countries, it is also of importance from the point of view of the expropriation by foreign governments of extensive properties of American nationals in foreign countries, whose interests we must keep in mind.

Having in mind the foregoing considerations, particularly our international relations, I consider it important that just compensation in the real sense be made to the Danish owners, and that section 902 of the Merchant Marine Act of 1936, as amended, be construed, if possible, so as to bring about this result. I am confident that you will take such steps as may be possible in this direction.

Sincerely yours,

CORDELL HULL.

Enclosure. Memorandum.

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*Document 20, pp. 167-173.

MEMORANDUM

April 12, 1943

Pursuant to the act approved June 6, 1941 (55 Stat. 242), this Government requisitioned certain immobilized Danish vessels in June 1941. The act provided for the payment of "just compensation" as follows:

"Just compensation should be determined and made to the owner or owners of such vessels in accordance with the applicable provisions of section 902 of the Merchant Marine Act, 1936, as amended."

Section 902(a) of the Merchant Marine Act of 1936, as amended (53 Stat. 1254), provides in part as follows:

"Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Commission to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property. The termination of any emergency so declared shall be announced by a further proclamation by the President. When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for the use of such property, *but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use.* * * *" [Italics added.]

It appears that the Comptroller General has held, in effect, that irrespective of the value of the Danish ships on the date they were requisitioned (June 1941), the so-called enhancement clause of section 902 (a) "prohibits the payment of compensation for such vessels to the extent that it may be based upon values in excess of the values existing

on September 8, 1939, provided such excess be determined as due to economic conditions directly caused by the national emergency". (Communication of November 28, 1942 to the Administrator, War Shipping Administration).

In his letter of May 1, 1941, to the chairman of the Committee on Commerce, United States Senate, in relation to Senate Joint Resolution No. 67, the Secretary of State stated:

"With regard to the acquisition of immobilized German, Italian, and Danish vessels in American ports, now in protective custody, *it is the view of the Department of State that these vessels should not be condemned without making just compensation to their respective owners.* It is believed that there is adequate authority in international law for this method of acquisition." [Italics added.]

There are also quoted the following excerpts from the record of the hearings on H. R. 4088 and House Joint Resolution 167, relating to this same subject, before the House Committee on the Merchant Marine and Fisheries, April 17-23, 1941, containing the testimony of Mr. Breckenridge Long, Assistant Secretary of State:

"Mr. Oliver. But we are citing as our reason for seizing or requisitioning these ships the necessity of our self-defense, so to speak, and it would appear to me that whether we have been aggressors or whether we have not been aggressors, that when we put ourselves in the same category as a nation that we do consider to be an aggressor, that we are losing something, our own tradition, so to speak.

"Assistant Secretary Long. Well, Mr. Oliver, we are not going to confiscate these vessels; we are going to pay for them and pay what they are reasonably worth.

"Mr. Oliver. I understand that is the situation.

"Assistant Secretary Long. The vessels are there lying idle.

"Mr. Oliver. I agree with that.

"Assistant Secretary Long. We are simply going to take over vessels and make just compensation for them."

Mr. Long's comments were supplemented on page 54 as follows:

"Assistant Secretary Long. We have vessels in protective custody, and they are still the property of foreign interests, and we are proposing to pay for them full value and to use the vessels which have been lying idle, many of which were used formerly in transporting goods to the United States which we now need more than ever."

The Department had in mind, of course, the payment of "just compensation" as heretofore determined by both municipal and international tribunals. As stated by Mr. Justice Butler in delivering the opinion of the Supreme Court in *Brooks-Scanlan Corporation* v. *United States* (265 U. S. 106, 123), it is settled by the decisions of that court that the term "just compensation" in article V of the amendments to the Constitution "is the value of the property taken at the time of the taking."

In its opinion rendered on October 13, 1922, the international tribunal established by the United States and Norway to pass upon the claims of Norwegian nationals arising out of the requisitioning of certain shipbuilding contracts, materials, and ships being built in the United States at the date of their requisition by this Government, the following statement was made with reference to article V of the amendments to the Constitution:

"It is common ground that in this respect the public law of the parties is in complete accord with the international public law of all civilized countries" (American Journal of International Law, vol. 17, pp. 362, 385).

It was added that "just compensation is due to the claimants under the municipal law of the United States, as well as under international law," and that it was "common ground" that such compensation is to be determined in the light of "the fair actual value of the property taken * * * at the time and place it was taken" and "all the surrounding circumstances" (ibid., p. 388).

In administrative decision No. III, rendered on December 11, 1923, the Mixed Claims Commission, United States and Germany, established pursuant to the agreement concluded by the two Governments on August 10, 1922, to adjudicate claims of American nationals against Germany, laid down certain rules with respect to claims "based upon property taken and not returned to private owners." It was said that the measure of damages which would ordinarily be applied was "the reasonable market value of the property as of the time and place of taking in the condition in which it then was, if it had such market value; if not, then the intrinsic value of the property as of such time and place" (Consolidated Edition of Decisions and Opinions, 1925-26, pp. 61, 63).

On March 11, 1924, the same Commission entered the following order:

"ORDERED, That in all claims falling within the terms of the Treaty of Berlin, based on the destruction of hulls, the measure of damages which will ordinarily be applied is the reasonable market value of the property destroyed in the condition in which it was as of the time and place of destruction, if it had a market value; if not, then the intrinsic value of the property as of such time and place. While the reasonable market value, if there were a true and ascertainable market value, will control, *notwithstanding the market may have been either depressed or inflated by abnormal conditions howsoever produced*, still purely speculative factors will be eliminated as far as practicable in arriving at such market value." [Italics added.]

"The American and German agents and their respective counsel in the preparation and presentation of cases, and the naval experts in the preparation of their reports to the Commission, will be governed accordingly" (ibid., p. 331).

In his report on the work of the Commission, the American agent made the following statements with respect to the matter of determining values pursuant to the above-mentioned order:

"The American agency in the meantime was engaged in gathering and assembling all available statistics as to actual sales of ships during the war period, the opinions of experts on such values, and information regarding the character of ships sold, as to their age, tonnage, physical condition, availability for use, cargo, capacity, and all facts which would have any bearing or materiality in the determination of the question of value.

"During the war it is well known that the values of ships rose enormously. The age of a ship was of slight consequence. There was a tremendous demand for ships of any kind, and the supply was limited. The values fluctuated widely and generally in accordance with the activities of the German submarine warfare. It was an extremely difficult matter to determine the value of a particular ship at a given time, but with the aid of the mass of statistics, tabulated statements of actual sales made prior to, throughout, and subsequent to the World War, charts prepared in accordance therewith showing the fluctuations in the market values of bottoms, and all the information assembled, it was found possible in most cases to arrive at a satisfactory conclusion.

* * * * * *

"As a result of these efforts, consultations, and conferences, the agents of the respective Governments in nearly all of the claims for the loss of hulls were able to present the claims to the Commission upon agreed statements of facts, including an agreed valuation of each ship for which a statement was filed, together with a recommendation for the consideration of the Commission of an amount to be awarded in each case. These recommendations were in each case approved by the Commission and awards entered accordingly" (Report of Robert W. Bonynge, 1934, p. 38):

The agreed statements filed with the Commission with respect to the values and recommendations arrived at by the agents, and on the basis of which the Commission acted, contained the following paragraph:

"IV. The values shown in the attached schedules were arrived at by the comparison with the prices obtained at the sales of American vessels of approximately the same type, age, and tonnage, effected at about the same time of loss of the respective vessels under consideration, they keep generally within the limits of the average rates of the prices paid under such sales, and the particular circumstances influencing the value of the lost vessel have been taken into account in each case" (ibid., p. 40).

Under the Settlement of War Claims Act of 1928 (45 Stat. 254) a war claims arbiter was appointed to hear certain classes of claims of German nationals against the United States. Among such claims were those arising out of the taking over by the United States of certain German vessels. Paragraphs 6 and 7 of section 4 (c) authorized the Secretary of the Treasury, following awards by the arbiter, to pay immediately amounts in the aggregate of 50 percent of the awards authorized to be made "on account of ships, patents, and radio stations." By findings of June 5, 1930, James W. Remick, as arbiter, determined the "fair value" of each of 94 ships, "to the owner, immediately prior to the time exclusive possession was taken by the United States under the authority of the joint resolution of May 12, 1917, in its condition at that time, taking into consideration the fact that such owner could not use or permit the use of such vessel, or charter, or sell, or otherwise dispose of such vessel for use or delivery prior to the termination of the war, and that the war was not terminated until July 2, 1921, including simple interest thereon at the rate of 5 percent per annum from July 2, 1921, to December 31, 1928, both dates inclusive." The fair value of the 94 ships, including interest, was found to be $74,243,000 (American Journal of International Law, vol. 25, p. 139).

In his opinion rendered in connection with the case of *MacAndrews and Forbes Company* (U. S.) v. *the Republic of Turkey*, Commissioner Nielsen stated:

"In *United States* v. *New River Collieries Co.* (262 U. S. 341; 344) the court asserted and applied the following general rule with respect to compensation for the taking of property:

" 'Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation.'

"International tribunals apply the same general rule, which, it is believed, may be taken as a rule of international law as well as of domestic law. It is also believed that, generally speaking, the rule should be and has been applied to arbitrary and unlawful taking or destruction of property. See the *Melczer Mining Company case* in the arbitration between the United States and Mexico under the convention of September 8, 1923, Opinions of Commissioners, Washington, 1929, p. 228" (Opinions and Report, pp. 89-90).

With reference to the limitation inherent in the so-called enhancement clause in section 902 (a) it may be observed that the tribunal established to pass upon the above-mentioned claims of Norwegian nationals against the United States held that, in determining just compensation, it was not bound by certain designated statutes of the United States "nor by any other municipal law, insofar as these provisions restricted the right of the claimants to receive immediate and full compensation, with interest from the day on which the compensation should have been fully paid ex aequo et bono." There are a number of international precedents in support of the principle underlying the tribunal's ruling. I may refer to the following statement made by Secretary of State Bayard in an instruction of November 1, 1887, to Mr. Connery, American Minister to Mexico:

"* * * if a Government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either

to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the Nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its suport." (Foreign Relations, 1887, p. 753.)

In the light of the foregoing precedents it seems clear that under principles of international law and pecuniary liability of this Government with respect to the Danish vessels in question can be fully discharged only by the payment of an amount which will represent "just compensation" in conformity with the decisions of the Supreme Court and international tribunals, that is, an amount determined on the basis of the actual value at the time of taking. If such compensation is not paid and the matter is submitted to an international tribunal for adjudication, it is expected that this Government will be found liable in an amount representing such actual value, plus interest.

Where a statute is open to more than one interpretation the rules of statutory construction require administrative bodies, entrusted with the duty of administering a law, to apply it, if possible, in such manner as to avoid running counter to the Constitution. Statutes should also be construed, if possible, so as not to run counter to our international obligations. This in the case of *McLeod* v. *United States* (229 U. S. 416, 434) the Supreme Court stated:

"The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to

violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law."

In the case of the Steamship *Lotus* before the Permanent Court of International Justice, Mr. John Bassett Moore stated:

"2. It is an equally admitted principle that, as municipal courts, the creatures of municipal law, derive their jurisdiction from that law, offenses committed in the territorial jurisdiction of a nation may be tried and punished there acording to the definitions and penalties of its municipal law, which, except so far as it may be shown to be contrary to international law, is accepted by international law as the law properly governing the case (report of Mr. Bayard, Secretary of State, to the President, case of Antonio Pelletier, January 20, 1887, Foreign Relations of the United States, 1887, p. 606, and the numerous authorities there cited; *Wildenhus' case*, 120 U. S. 1). This principle is not contrary, but it is correlative, to the principle laid down in numerous decisions of municipal courts, that international law is to be considered as forming part of the law of the land, that it is as such to be judicially administered in all cases to which it is applicable, and that municipal enactments ought not to be so construed as to violate international law, if any other construction is possible (Chief Justice Marshall, *Murray* v. *Schooner Charming Betsey* (1804), 2 Cranch 64, 118; Sir William Scott, Le Louis (1817), 2 Dodson 210, 239)" (II Hudson, World Court Reports 20, 68).

Attention is also invited to the following statements of Secretary of State Root in a communication of March 16, 1906, to the Secretary of Commerce and Labor:

"In support of the contention that foreign diplomatic officers are not exempt from the head tax, an opinion of the Attorney General, dated February 20, 1905, is submitted.

"It is not the intention of this Department to impugn or to criticize this opinion; it is however, suggested that

the opinion considers solely the letter of the statute and does not take into consideration the fact that international law is as much the law of the land as is a statute. Nor is the statute interpreted in relation to international law, as is the rule of construction in such cases" (Hackworth, Digest of International Law, vol. IV, 460-461).

In *Schroeder* v. *Bissell, Collector (The Over The Top)* (5 F. (2d) 838, 842), it was said:

"(2) If, however, the court has no option to refuse the enforcement of legislation in contravention of principles of international law, it does not follow that in construing the terms and provisions of a statute, it may not assume that such principles were on the national conscience and that the congressional act did not deliberately intend to infringe them. In other words, unless it unmistakably appears that a congressional act was intended to be in disregard of a principle of international comity, the presumption is that it was intended to be in conformity with it."

It is not believed that either the language of the statute in question or its legislative history indicates that it was intended to be in disregard of established international law in relation to the payment of "just compensation" as interpreted and applied by international tribunals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 132.

THE UNITED STATES, *Petitioner*

v.

RICHARD S. CORS, *Respondent*

On Writ of Certiorari to the Court of Claims.

BRIEF AMICI CURIAE OF R. T. C. NO. 11 CORPORATION, SMITH-DOUGLASS COMPANY, INC., AND FALL RIVER NAVIGATION COMPANY.

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Preliminary Statement.

The issues raised by the instant case are of the most profound importance to each of the *Amici Curiae*. This is conceded by Petitioner which lists their vessels in Appendix D to its brief. Each company at the time that the United States entered the Second World War owned a vessel, which had been acquired with its own funds for use

in his own business. In each case the vessel was requisitioned for title by the War Shipping Administration, and in each case the interpretation urged by Petitioner of Section 902 of the Merchant Marine Act, 1936, would result in what the War Shipping Administration urged and the Comptroller General admitted is a "hardship". The situation of one of these vessels was described by the War Shipping Administration in a letter to the Comptroller General as "typical." (War Shipping Administration Doc. 20, p. 185).

While there is complete agreement with the argument made in the brief for Respondent in this case, it is believed that the further considerations herein contained should be before this Court when it considers the novel rule for determining just compensation advocated by Petitioner.

The ZEPHYR.

The facts regarding this ship were considered by the War Shipping Administration as "typical," for the purpose of illustrating to the Comptroller General and testing with him the unfair and unreasonable results flowing from his interpretation of Section 902 which the Petitioner now advocates. The Comptroller General admitted that his interpretation involved "hardship" but contended that "the injustice—if such it may be called—of construing the language of Section 902(a), as it is written does not reach such shocking proportions as to warrant the conclusion that the Congress could not have meant what it said," and insisted upon payment of the low 1939 market prices for vessels purchased in the higher 1941 market (WSA Doc. 20, pp. 186-190). The following statements concerning the ZEPHYR are taken from Admiral Land's letter of April 27, 1943, to the Comptroller General (WSA Doc. 20, pp. 184-186):

> "In the fall of 1941, the R. T. C. No. 11 Corporation acquired this vessel * * * in Cleveland, Ohio. The pur-

chase price paid in cash * * * was the sum of $262,500, or $116 per ton. The vessel was at that time on the Great Lakes, and the purchaser wished to use it in the Atlantic. * * * "

"The owners advise that the costs of bringing the vessel to New York and the improvements and betterments placed on the vessel by them total $43,314. The total investment, including repairs, raises the actual cost of the vessel to about $135 per ton.

* * * * The First National Bank of Boston lent to the owner the sum of $166,000, or about $74 per ton, secured by a first preferred mortgage lien on the vessel about the time of acquisition.

* * * * * *

"Our investigation discloses that there was no intercompany connection or relationship of any kind between the buyer and seller. * * * The transaction was made completely at arm's length * * * . To summarize:

1. The tanker was worth about $55 per ton in 1939.
2. The buyer paid $116 per ton in 1941.
3. The First National Bank of Boston loaned $74 a ton on the tanker in 1941 to the buyer on the basis of a bona fide appraisal showing the value at $111 per ton.
4. The buyer spent over $40,000 in arranging to transfer the vessel from the Great Lakes to the Atlantic coast and in reconditioning the vessel, making a total investment by the buyer of over $305,000 or approximately $135 per ton.
5. The entire transaction was open and aboveboard."

This vessel was requisitioned for title on July 24, 1942. Under the Comptroller General's ruling, now preferred by Petitioner, it is argued that our Constitution permits and the Congress requires the courts to hold that an owner who, before we were at war but within eight months of the taking, expended for his property over $305,000, should nevertheless be paid only $123,970, thus suffering an out of pocket loss, not attributable to genuine market

decline, of $181,030, or more than 50% of his investment in the vessel. Petitioner's contention would also have the Constitution permit, and the Congress require the courts to award the owner less than the $166,000 first preferred mortgage lien on the vessel conservatively placed by a commercial bank.

It is submitted that the War Shipping Administration was correct in contending with the Comptroller General that so unreasonable a result was not intended by the Congress or permitted by the Constitution. It is submitted further that the Comptroller General was wrong in contending "that this does not reach such shocking proportions as to warrant the conclusion that the Congress could not have meant what [the Comptroller General and now the Petitioner contend] it said." (WSA Doc. 20, p. 190)

The INTERNATIONAL.

Smith-Douglass Company, Inc., the owner of this vessel, is not a shipping company but is a manufacturer of fertilizer. It purchased the INTERNATIONAL as a floating cannery and converted her into a dry cargo vessel for the purpose of using her in transporting sulphur, phosphate rock and potash from Gulf ports to its factory at Norfolk, Virginia. The following facts concerning the vessel are taken from the Findings of Fact of the Court of Claims in *Smith-Douglass Company, Inc.*, v. *United States*, No. 46,289, decided December 6, 1948.

"Plaintiff purchased the vessel on April 24, 1941, for the sum of $250,000 and in further consideration agreed to bareboat charter the vessel back to the seller for the fishing season of 1941. At the bareboat charter rate then current in the fishing industry for a vesel of this character, the charter for the vessel had a value of approximately $53,112, making a total consideration to the seller of approximately $303,112." (p. 4) The Smith-Douglass Company, Inc., converted her from a floating cannery to a "dry cargo vessel

at a cost of approximately $64,000" (p. 4), and expended a further amount of approximately $60,000 for "repairs, renewals, reconditionings, and similar maintenance work" (p. 5), prior to the date on which the vessel was requisitioned for title. Thus the investment in the INTERNATIONAL from April 24, 1941 to the date of requisition for title on October 6, 1943, aggregated $427,112. The owner insured her for $425,000 (p. 5). The Court of Claims made an award of only $290,000, as of the date of requisition.* Nevertheless, at the request of the Government, the Court of Claims made a finding of the "fair market value" of the INTERNATIONAL as of September, 1939, the rollback date urged by Petitioner herein. This "was $18 per deadweight ton, or $88,600" (p. 6).

Thus, under the interpretation of Section 902 urged by Petitioner, this Court would be required to order an award of only $88,600 for the INTERNATIONAL, or less than 25% of the owner's actual investment in the vessel during the period of approximately two years immediately prior to the date of requisition for title.

The WILLIAM C. ATWATER.

This vessel was purchased by the Fall River Navigation Company in 1927 and used in that company's regular service along the Atlantic and Gulf coasts of the United States and between various foreign ports in the Caribbean area and United States ports. She was requisitioned for title on October 27, 1943. On that date the owner's undepreciated cost of the vessel (original cost plus capital additions, less depreciation), based upon the useful life and rate of

* The award of $290,000 was based upon the Court of Claims finding of value as of the date of requisition. However, the date of requisition was after the War Shipping Administration had pursued its "line of strategy" of "reducing or otherwise destroying" ship values. (See footnote page 6, *infra*. Smith-Douglass Company, Inc., takes exception to the award based upon values after the market had been "reduced or otherwise destroyed" for the purpose of making a bargain on requisition, but that point does not arise in the instant case.

depreciation as determined by the Bureau of Internal Revenue for tax purposes, was $178,769.32.

The War Shipping Administration offered as the value of this vessel at the date of requisitioning only $14,000.00.*

Inasmuch as Petitioner's contentions respecting the enhancement clause produce results lower than those reached by the War Shipping Administration on its view of the market at the date of taking, it will appear that approval by this Court of Petitioner's contentions would result in virtual confiscation of the WILLIAM C. ATWATER.

The foregoing instances illustrate the unreasonable results reached under the Comptroller General's original interpretation of Section 902. The results are hardly less

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*Inasmuch as the contemporaneous interpretation of Section 902(a) by the War Shipping Administration was contrary to the Comptroller General's interpretation of that Section, it may be wondered why so many ship owners were dissatisfied with the offers made by the War Shipping Administration. The explanation, in the view of these *Amici Curiae*, is this:

1. The War Shipping Administration averaged 1941 and early 1942 sales of vessels of all kinds—"lakers", laid-up ships, ships in disrepair, etc.,—and based its offers for ocean-going ships in good operating condition requisitioned in the later part of 1942 and during 1943 on these low averages. Compare Petitioner's Appendix E.

The case of the ZEPHYR is typical. Though purchased in November, 1941, as a "laker" and converted into an ocean-going vessel at a total cost of more than $305,000, the War Shipping Administration offered for her only $253,020, apart from interest, as of the date of requisitioning, July 24, 1942.

2. For many vessels the War Shipping Administration used formulae that produced results far out of line with market conditions. The case of the MacARTHUR is typical.

3. For vessels taken after the War Shipping Administration had pursued a "line of strategy" of "reducing or otherwise destroying" ship values, the War Shipping Administration measured its offers by the low price which it induced for the admitted purpose of achieving a bargain on requisition. (WSA Doc. 20, p. 197; Doc. 20A, p. 9; Petitioner's Brief, pp. 106-107, footnotes.)

The case of the INTERNATIONAL is typical. She was not taken until October 6, 1943, after the War Shipping Administration had, according to its own contentions succeeded in destroying ship values for the purpose of enjoying bargains on requisition. The War Shipping Administration offered for her only $236,018.78 (including interest) despite the fact that the owner had invested $427,112 in the vessel during the two years immediately prior to the date of requisition.

Whether this will stand up under any of criteria of *United States* v. *Felin*, 334 U. S. 624 (1948), remains to be tested. That issue does not arise in the instant case for the admitted market was equal to the lower court's award (Petitioner's Brief, p. 9, footnote).

It is significant that although the War Shipping Administration sought by every available means to secure acceptance of its low offers of compensation, it nevertheless opposed the Comptroller General's interpretation of Section 902(a) now preferred by the Petitioner.

unreasonable under his modified view inasmuch as it does not reflect accurately the movement of the market for old ships. The same applies to Petitioner's interpretation of the rules of the Advisory Board.

Argument.

Throughout its brief Petitioner seeks to compare the enhancement clause of Section 902(a) with the renegotiation law, and argues for support of its interpretation of the enhancement clause as if the purpose and effect of that clause were to limit profiteering on the Government's need for vessels during a period of national emergency (Petitioner's Brief, pp. 67, 78). We respectfully submit that there is no valid comparison between the enhancement clause and the renegotiation law.

The renegotiation law dealt with limitation of *profits* on voluntary contracts to furnish manufactured products. It expressly excepted materials such as mine products and timber that represented depletion of capital assets (58 Stat. 88).

Section 902 deals with the most sweeping power a government can assert—the taking by compulsion of capital assets which the owners need to earn their livelihood and which the owners have to replace at the market at the time and place of taking. Yet Petitioner would have this Court in a requisition case impose an out-of-pocket loss on capital assets by analogy with a statute that guaranteed costs plus a reasonable profit on a voluntary merchandise contract. If there were an analogy between the renegotiation and similar war statutes to the requisition statutes, the exceptions they make to protect capital assets and assure reasonable profits on merchandise would argue against Petitioner's contentions.

The only war-time statutes that are analogous to Section 902 are the General Requisitioning Act of October 16, 1941 (55 Stat. 742; 56 Stat. 176, 181) and the Act of October 10,

1940 (54 Stat. 1090). These required just compensation as heretofore defined by this Court, i.e., the fair market value at the time and place of taking.*

If Petitioner's construction of the enhancement clause were valid, there would be no reason why a similar provision should not be applied to the manufacturer who pro-

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*With respect to the bearing of the other requisitioning statutes, upon the interpretation of Section 902, the War Shipping Administration stated:

"In the Second War Powers Act, Public Law 507, approved March 27, 1942, Congress adopted the rule of the *Monongahela* case in providing that property taken under the general requisition law should be compensated for as follows:

'The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under Section 2 of this Act, *but each determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States.*'

"The chairman of the Committee on the Judiciary of the House of Representatives took a leading part in the discussion of this measure on the floor, and expressed his views as follows (Congressional Record, volume 88, pp. 1831, 1932):

'Now here is the citizen's guaranty of a square deal. It is in the Constitution. This is the language:

"Nor shall private property be taken for public use without just compensation."

* * * * * * *

'There is no difference between wartime and peacetime insofar as the duty of the Government and the necessity of the Government to respond in just compensation when private property is taken. Since the beginning of the Government, by judicial construction, measures of fair compensation have been established. * * *

'*No act of requisitioning and no act that this Congress can pass can limit the right of recovery guaranteed to the citizen by the Constitution of the United States.*

* * * * * *

'I do not care what you write in the statute, what rule of damages you prescribe here, you could not make the compensation less than just compensation. You may by legislation prescribe a rule that would make the Government pay more than just compensation, but you cannot make it pay less. I repeat that. *You may by legislation provide that the Federal Government must pay more than fair compensation, but you cannot effectively provide that it shall pay less.*' (Emphasis added.)

"The views of the Congress as to the *Monongahela* doctrine were thus based on an accurate consideration and acceptance of the *Monongahela* case as expounded by the chairman of the House Judiciary Committee." (WSA Doc. 20, pp. 271, 272.) (All italics in original.)

duces war goods, to the farmer who sells produce grown during a war period, or even to the laborer employed in a war plant. If the Government may seize a vessel and pay the owner for her on the basis of prices prevailing at some prior period, disregarding entirely the current prices and the cost of the vessel to the owner, there is no reason why it could not also require a manufacturer to produce war materials and pay for them at prices existing prior to the emergency, although the manufacturer would be compelled to pay current prices for his raw material, labor and other costs. Likewise, the Government could require the farmer to sell his produce at prices prevailing prior to the emergency period despite the fact that the farmer's current costs were in excess of the prices paid him by the Government. There is no more reason for singling out the ship owner and requiring him to accept less than cost for his vessel, than for requiring the manufacturer, farmer, or laborer to accept less than cost for his commodity.

The Petitioner's argument also overlooks the fact that the requisitioning of the vessels by the Government, and the payment of current prices therefor, would even then result in lesser earnings to the ship owner than to the railroads, the truck lines, bus lines and manufacturing establishments, which were permitted to operate in their usual manner, and to realize a reasonable profit by reason of continuing ownership and possession of their capital assets.

Petitioner's construction of the enhancement clause would severely penalize the citizen who is compelled to purchase a vessel for use in his regular business during any period of rising prices. He would have no protection in his acquisition of the vessel corresponding to the enhancement clause, but would be compelled to pay the prevailing market prices at the date of the purchase, just as Smith-Douglass Company, Inc., and R. T. C. No. 11 Corporation did in the instances cited herein.*

* The hardship imposed upon R. T. C. No. 11 Corporation as a result of the application of the enhancement clause in the determination of just compensation for the ZEPHYR was referred to by Admiral Land, the Adminis-

The enhancement clause as construed by Petitioner grossly discriminates between the owner of a completed vessel ready to operate and the shipyard which has available only the materials necessary to construct a vessel. The owner of a completed vessel purchased after 1939 would be required to surrender that vessel and accept just compensation determined by the method which will not return to him his cost. On the other hand, the shipyard, possessing only the raw materials required to produce a vessel, may use them in the construction of a new vessel and is permitted not only to obtain its full cost but also a fair profit.

The approval of any of the interpretations urged by Petitioner would result in a payment to those ship owners, who have not yet reached an agreement with the Maritime Commission, of an amount of just compensation less than that paid by the War Shipping Administration for comparable vessels to those who have completed their settlement. Since the Comptroller General acquired, in effect, the right of pre-audit, he has insisted that the Maritime Commission make no settlements except on his interpretation of Section 902 (Public Law No. 299, C. 414).

The Merchant Marine Act, 1936, as amended, had as a purpose the fostering of American ownership of ocean-going vessels (Sec. 101). Petitioner's construction of Section 902 is inconsistent with this purpose. Its effect would

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trator of the War Shipping Administration, in his testimony on H. R. 2731 (78th Cong.) (pp. 11-12) as follows:

> "The document [Doc. 20] also contains two illustrative cases showing the purchase of a fishing boat and a tanker in 1941 at prices which were higher than those permissible under the proposed legislation. This raises the question as to whether a bona fide purchaser of a vessel in 1940 or 1941 who paid no more than the prevailing market price should be forced to take a loss when the vessel is requisitioned by the Government. The committee will undoubtedly wish to consider this problem."

In the same testimony Admiral Land also stated (p. 12):

> "It is generally agreed, I believe, that the enhancement clause is not a limitation upon the courts, and that in the event of litigation just compensation would be determined in accordance with judicial precedents in applying the constitutional guaranty."

be to stifle further shipping activity as soon as any emergency appeared possible. No person would dare buy a ship or even a tug during any such period no matter how badly she were needed to carry on his regular business activity, because there would always be the danger that the vessel might be seized by the Government and just compensation determined on the basis of the lower prices prevailing at some earlier date. Congress clearly intended that Section 902 be interpreted to be consistent with the whole of the Act of which it was a part.

Conclusion.

Congress could not have intended the unfair and discriminatory effects which would follow if Petitioner's construction of the enhancement clause were sustained by this Court. The Respondent's construction of that clause is consonant with the long established principles of statutory and constitutional construction, and is the only construction which will give the ship owner "just compensation" for the requisitioning of his vessel. Therefore, the construction adopted by the Court of Claims and urged by the Respondent should be sustained.

Respectfully submitted,

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